Supreme Court, U.S.
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In The

Supreme Court of the United States

ABKA LIMITED PARTNERSHIP, an Illinois limited partnership, and THE ABBEY HARBOR CONDOMINIUM ASSOCIATION, LTD., a Wisconsin nonprofit corporation,

Petitioners,

vs.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES, an agency of the State of Wisconsin, and WISCONSIN ASSOCIATION OF LAKES, INC., a Wisconsin nonprofit corporation, and WISCONSIN REALTORS ASSOCIATION, INC., a Wisconsin nonprofit corporation,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Wisconsin

PETITION FOR WRIT OF CERTIORARI

*THOMAS L. SHRINER, JR.
G. MICHAEL HALFENGER
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-5306
(414) 271-2400
Attorneys for The Abbey Harbor Condominium Association, Ltd.

WALTRAUD A. ARTS
1 South Pinckney Street
Madison, Wisconsin 53701-2113
(608) 283-2469
Attorneys for ABKA Limited Partnership

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

May a state supreme court, consistent with the Due Process Clause of the Fourteenth Amendment, resolve a case on an issue never raised until the supreme court's decision, contrary to an undisputed finding made below, and without giving prior notice to or an opportunity to be heard by the parties, when the result is to deprive persons of their entire interests in valuable real property?

LISTS REQUIRED BY RULES 14.1(b) AND 29.6

Pursuant to this Court's Rules 14.1(b) and 29.6, petitioners certify that the names of all parties to the proceeding in the Supreme Court of Wisconsin appear in the caption of the case. Petitioner ABKA Limited Partnership certifies that it is an Illinois limited partnership and has no parent corporation. Petitioner The Abbey Harbor Condominium Association, Ltd. certifies that it is a Wisconsin nonprofit corporation and has no stock and no parent corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners ABKA Limited Partnership and The Abbey Harbor Condominium Association, Inc., petitioners in the courts below, respectfully petition this Court to issue a writ of certiorari to the Supreme Court of Wisconsin to review the judgment in *ABKA Limited Partnership v. Wisconsin Department of Natural Resources*, 2002 WI 106, 255 Wis. 2d 486, 648 N.W.2d 854 (Wis. S. Ct. No. 99-2306, July 16, 2002).

OPINIONS AND ORDERS BELOW

The Wisconsin Supreme Court's opinion of July 16, 2002, including concurring and dissenting opinions, is reported at 2002 WI 106, 255 Wis. 2d 486, 648 N.W.2d 854, and is reproduced at App. 1-47 of the appendix to this petition. Its order granting review and listing the issues on review, entered December 17, 2001, is reproduced at App. 48-51. The August 22, 2001 opinion of the Wisconsin Court of Appeals, including the dissent, is reported at 2001 WI App 223, 247 Wis. 2d 793, 635 N.W.2d 168, and is reproduced at App. 52-88. The opinion of the Circuit Court for Walworth County, Wisconsin (Gibbs, J.) of June 4, 1999 is reproduced at App. 89-123, and the final order entered upon that opinion at App. 124.

The opinion of the Wisconsin Court of Appeals of December 10, 1997, affirming denial of a motion to intervene in the proceedings before the Circuit Court, is reproduced at App. 125-130. Excerpts from the transcript of a hearing of December 2, 1996 before the Circuit Court (Carlson, J.), containing that court's reasons for denying the motion to intervene, are reproduced at App. 131-134.

The findings of fact, conclusions of law, order and permit issued by the Administrative Law Judge for the Division of Hearings and Appeals of the Wisconsin Department of Administration on July 29, 1996 is reproduced at App. 135-199.

The Wisconsin Supreme Court's order of October 23, 2002 denying reconsideration is reproduced at App. 200-202.

JURISDICTION

The Wisconsin Supreme Court's opinion was issued on July 16, 2002, and its order denying reconsideration was entered on October 23, 2002. This Court's jurisdiction arises under 28 U.S.C. § 1257(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution, § 1, provides, in pertinent part:

> nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

This is an unusual case, in that the federal constitutional question did not arise until the decision of the state's highest court. That court has refused, on motion to reconsider, to rectify its constitutional error. Thus, only this Court has the authority to vindicate the due process

violation visited upon the petitioners by the state supreme court itself.

The underlying case was resolved on state law grounds which petitioners cannot and do not ask this Court to review. This petition relates only to the way in which the Wisconsin Supreme Court itself decided the case. After seven years of litigation, the court resolved the case based entirely on an issue that no party had ever raised and that the court itself had never adverted to until its decision.

In so doing, the Wisconsin Supreme Court purported to deprive the owners of 185 condominium units worth millions of dollars (*see* App. 7, 32) of the entire value of their property, without any notice or opportunity to be heard. Indeed, the lower state courts had, years earlier, denied those very unit owners the right to intervene in the proceedings on the ground that it was merely an agency review proceeding involving a dock permit, so that their property rights were not at risk. (App. 129-130, 132-133.) And yet the supreme court decided the case squarely on the ground that those unit owners had no property rights, announcing *both* that the continued existence of their property rights was an issue in the case (App. 14-15) *and* that they had lost those rights (App. 23) only in its decision.

The federal question of whether the supreme court had violated the Fourteenth Amendment due process rights of the petitioners and of the absent unit owners and their lenders, by eviscerating their property rights without disclosing that it was even considering that never previously raised issue, was implicit in the dissenting opinion of Justice Diane S. Sykes, joined in by Justice David T.

Prosser. (App. 32-34, 40, 44-47.) Petitioners raised the issue expressly in their motion for reconsideration, which the supreme court denied, without explanation. (App. 201-202.)

A. The Facts

As noted, what the underlying case was about is really irrelevant to the issue raised by this petition. It began when petitioner ABKA Limited Partnership, a condominium declarant, sought a determination from the respondent Wisconsin Department of Natural Resources ("DNR") that its existing permits to maintain 407 docks in the public waters of an article harbor created by the dredging of a navigable stream – permits that had been issued over the course of more than 30 years – remained valid despite ABKA's having converted ownership of the riparian land and the appurtenant docks to condominium form. An agency proceeding began, in which petitioner The Abbey Harbor Condominium Association, Inc., the statutorily mandated condominium owners' association, joined ABKA Limited Partnership as an applicant. Respondent Wisconsin Realtors Association, Inc. joined the proceedings in support of the petitioners, and respondent Wisconsin Association of Lakes, Inc. joined the DNR in opposition to the petitioners. (App. 5-6.)

B. The Proceedings Below

The agency proceedings centered on the state law issue of whether the DNR could require new permits for the marina because it was now a condominium. (App.135.) The administrative law judge determined that the condominium conversion would violate the Wisconsin public trust doctrine unless no more than 120 of the 407

docks were used by the unit owners themselves, and he ordered a new permit to be issued containing that limitation. The owners of the other 287 units would have to rent their docks to members of the "public," that is, to non-unit owners. (App. 197-199.)

Throughout the proceedings, the effectiveness of the condominium declaration to create a condominium itself was treated as given. The conceded effectiveness of the declaration was the starting point, as it were, for the proceeding. Indeed, the ALJ made uncontested findings, based on expert testimony, that the condominium units created under the declaration, despite their small size and value, complied with the Wisconsin Condominium Ownership Act. (App. 146-148, 151-153.) Like the parties, the ALJ treated the condominium declaration as fully effective.

When petitioners sought judicial review in the state circuit court, certain of the unit owners sought leave to intervene, contending that the need to rent their docks to the public gave them a stake in the proceedings sufficient to justify their participating in the court case. The circuit court denied review, and the intermediate appellate court affirmed the denial, holding that, because this was only a review of an administrative proceeding concerning issuance of a dock permit and whether docks should be held open for public rental, the unit owners did not qualify to intervene. The virtual representation of unit owners by the applicants (the present petitioners) was adequate to protect their interest in the regulation of the docks. (App. 129-130, 132-133.)

REASONS FOR GRANTING THE WRIT

The decision below resolved a dispute governed by the law of Wisconsin. The Wisconsin Supreme Court is the judicial body with final authority to resolve issues of state law conclusively, and this petition recognizes that. The sole issue presented here is whether a state supreme court may, consistent with the Due Process Clause of the Fourteenth Amendment, resolve a case on an issue never raised, contrary to an undisputed finding of fact below, without prior notice to or an opportunity to be heard by anyone and, in so doing, deprive persons of their valuable property.

By its actions, made express by its denial of the petitioners' motion for reconsideration, the Wisconsin Supreme Court has decided an important question of federal law that was squarely decided by this Court as long ago as *Saunders v. Shaw*, 244 U.S. 317, 37 S. Ct. 638, 61 L. Ed. 1163 (1917), in a way that conflicts with that holding.

Moreover, the state supreme court's utter disregard of the parties' basic right to notice and an opportunity to be heard before resolving an important state law issue affecting ownership of millions of dollars worth of riparian real estate can only be addressed and corrected by this Court.

The principle established in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983), makes it essential that this Court be willing to intervene on those happily rare occasions when, as here, the highest court of a state so departs from the fundamental norms of due

process as to require relief that *only* this Court can give. By showing that it is willing in fact, and not just in theory, to exercise its exclusive power to compel state high courts to recognize the due process rights of litigants, in cases of egregious violation like this one, the Court can make a significant and needed contribution to the protection of state court litigants' federal constitutional rights.

I. THE PROCEDURE FOLLOWED BY THE WISCONSIN SUPREME COURT, IN DECIDING THIS CASE UPON AN ISSUE NEVER PREVIOUSLY RAISED, HAS DEPRIVED THE PETITIONERS OF DUE PROCESS.

As recently as 1996, this Court reconfirmed that the irreducible minimum requirement of due process in a judicial proceeding is effective notice and a meaningful opportunity to be heard before substantial rights are impaired. As the Court said in *Richards v. Jefferson County,* 517 U.S. 793, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996):

> We begin by noting that the parties to the *Bedingfield* case failed to provide petitioners with any notice that a suit was pending which would conclusively resolve their legal rights. That failure is troubling because, as we explained in *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306[, 70 S. Ct. 652, 94 L. Ed. 865] (1950), the right to be heard ensured by the guarantee of due process "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."

Id. at 799.

Petitioners here (although not the condominium unit owners) had formal notice of the proceedings in the state supreme court and were in fact deeply involved in them. What they did not know and could not know was that the validity of the condominium declaration itself, and the consequent legality of the conveyances of condominium units to their owners, would turn out to be the "issue" on which the case would turn. The petitioners were in court but had no occasion or opportunity to address the key issue that the supreme court decided.

The denial of due process under those circumstances is just as real and just as invidious as it would be if the petitioners had been kept out of court altogether. In order to comport with due process, *pro forma* access to the courts is not enough; such access must be "adequate, effective, and meaningful." *Bounds v. Smith,* 430 U.S. 817, 822, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977).

Here, the Wisconsin Supreme Court publicly announced, in its order granting review (App. 49-50), what issues it would consider on appeal. All three were substantial questions of state law. The first was a question of administrative agency procedure that the parties agreed the court of appeals had gotten wrong and that should be reversed. The supreme court unanimously agreed. (App. 13-14, 34.)

The latter two state law questions, however, *had as their stated premise* that the condominium declaration had been effective, so that title to the riparian land previously owned by the condominium declarant now resided in the condominium unit owners. Consistent with the fact that no one had ever raised a question below, or in the

appellate courts, about the validity of the condominium declaration, that issue was not one of those announced in the order granting review.

And yet that unannounced question, asked and answered simultaneously in the supreme court's opinion, is precisely the ground on which the court decided the case. The declaration, the court held, "fail[ed] to create valid units" (App. 23), and "[w]ithout a valid unit, the unit 'owners' do not hold real property." (App. 26.) With those words, resolving an issue that no one had notice that the court was even considering, real property interests for which millions of dollars had been paid vanished into thin air.

If a state trial court were to disregard the argued issues in a case and deprive parties (and nonparties) of substantial property based on unargued issues of which the parties had been given no notice, and no opportunity to respond, and were then to refuse to reconsider its decision, the parties whose constitutional rights had been violated would look to the appellate courts of the state to remedy the due process violation. When the highest court in the state commits such a violation, the *Rooker-Feldman* doctrine leaves the power and responsibility to undo the wrong in this Court alone.

This Court dealt with this situation in *Saunders,* 244 U.S. 317, for example, where the Supreme Court of Louisiana had grounded its decision on a conclusion that the losing party had not been allowed to address. The issue in *Saunders* was whether certain landowners could avoid paying a drainage tax on the ground that their land could not benefit from the drainage project to be funded. The trial court had excluded evidence relating to the condition

of the property, and the defendant had accordingly had no reason to rebut that evidence. *See id.* at 318.

After initially affirming a ruling in the defendant's favor, the state supreme court granted rehearing on the basis of an intervening decision by this Court in another case. The rehearing resulted in a reversal of the judgment below, with the supreme court concluding that the land in question was low and marshy and had not and could not benefit from the drainage project. *Id.* at 319.

Writing for a unanimous Court, Justice Holmes explained that the intervening defendant

> says that he has been deprived of due process of law contrary to the Fourteenth Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence. Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view. . . . Probably the majority of the Supreme Court thought that . . . to remand it would be an empty form, – a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in.

Id.

Reinforcing the due process foundations for its reversal of the Louisiana Supreme Court, the *Saunders* Court went on to insist that:

> when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, *it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved . . . could not come here.* The defendant was not bound to contemplate a decision of the case before his evidence was heard.

Id. at 320 (emphasis added).

The due process problem here is even more acute than the one corrected in *Saunders*. The determinations of fact in the agency proceeding that the supreme court rejected were founded in expert testimony and never contested, either before the agency, in the intervening courts, or in the supreme court. The legal issue that the supreme court decided on the basis of its own, contrary factual determination had never been dealt with by anyone, parties or decision-makers, at any level until the court's July 16, 2002 decision. It was literally a case of first impression under Wisconsin law. The record not only provided no "absolute warrant" for the court's factual assumption; it flatly contradicted it.

Here, just as in *Saunders*, fundamental due process requires that claimants not be deprived of property rights before they have had a chance to make their case on what turns out to be the determinative issue.

The Wisconsin Supreme Court has previously articulated rules, not followed here, to control itself when

considering questions not raised by the courts below, including a general rule that "issues not raised in the circuit court will not be considered for the first time on appeal," and that it will depart from that rule only "[w]hen an issue involves a question of law rather than of fact, when the question of law has been briefed by both parties and when the question of law is of sufficient public interest to merit a decision." *Apex Electronics Corp. v. Gee*, 217 Wis. 2d 378, 384, 577 N.W.2d 23, 26 (1998). These criteria were not satisfied; the parties were given no chance to address the issue, in any form.

These criteria are not only the dictates of prudence and efficiency, but are constitutionally required. The state supreme court's departure from them in this case has done great harm that should be corrected, in a way that only this Court can accomplish. This Court should grant certiorari, to the end that the judgment of the Wisconsin Supreme Court be vacated and the case remanded for further briefing, reargument, rehearing, and reconsideration of the issue first identified in that court's decision, after an opportunity for all parties whose interests are implicated by the question to participate.

II. THE WISCONSIN SUPREME COURT'S DECISION THAT THE CONDOMINIUM DECLARATION WAS INVALID ALSO VIOLATED THE DUE PROCESS RIGHTS OF THE OWNERS OF THE CONDOMINIUM UNITS AND THEIR MORTGAGE LENDERS.

Like the absent taxpayers whose procedural due process rights were vindicated by the Court in *Richards*, 517 U.S. 793, the buyers of the condominium units and appurtenant rights here, as well as their mortgage

lenders, were not in court at all. The state circuit court had earlier found the unit owners' absence unobjectionable, because they had been content with the petitioners' proxy protection of their interests in the administrative proceedings before the ALJ. It was hard to see how any issues not put to the ALJ in the dock permit hearing could come up in a judicial review of those administrative proceedings.

The supreme court changed all of that when it determined – following an oral argument at which the issue was not raised by any party *or by any member of the court* – that the validity of the condominium declaration (and therefore of the conveyances made under it) was in doubt. At that point, unit owners (and their lenders) became stakeholders whose presence was affirmatively required.

The unit owners' fee interest in the units that they had purchased relates directly in the case of each owner to the legal effectiveness of the conveyance that created that fee interest. It borders on the tautological to say that each fee owner had a pronounced interest in whether he or she actually owned anything at all.

In addition to deciding their property rights in their absence, the supreme court's decision also violated the absent unit owners' (and the petitioners') due process rights by departing in a completely unforeseeable way from state law. The relevant state condominium statute, Wis. Stats. § 703.02(15) (1995-96), says that a unit qualifies for condominium status if it is capable of "any" independent use. The statute had never previously been construed by the supreme court, nor had any party ever suggested that it was in need of construction.

Implicit in the supreme court's decision is the conclusion that the statutory term "any," despite its categorical

breadth, excludes some perfectly plausible independent uses that might readily be shown by parties if they had been afforded a chance to brief the issue.

The possibility that "any independent use" might turn out to mean "some independent use" or "any independent use exceeding an unspecified threshold of materiality" is not fairly suggested by the statutory language. That possibility was not foreseen by the expert witness who testified without contradiction on this point before the ALJ (App. 146-148, 151-153), nor by any of the adverse parties, who would have had every interest in advancing that argument if it had occurred to them in the seven years they were litigating this case. (App. 33.) It certainly could not have been foreseen by the unit owners, whose only interest was in enjoying property rights that a seemingly unambiguous Wisconsin statute appeared to give them.

The inability to foresee the Wisconsin Supreme Court's interpretation implicates due process concerns with respect to parties who, like the absent unit owners here, acquired vested property interests affected by that interpretation before it was announced, and it clearly implicates the interest of the petitioner condominium declarant, which had conveyed those interests to the unit owners.

In *Hughes v. Washington*, 389 U.S. 290, 88 S. Ct. 438, 19 L. Ed. 2d 530 (1967), for example, this Court held that the State of Washington could not divest littoral land owners of their interests in accreted land by changing its interpretation of state law. In a much-cited concurrence, Justice Stewart explained that:

> To the extent that the decision of the Supreme Court of Washington . . . arguably conforms to reasonable expectations, we must of course

> accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.

Id. at 296-297 (Stewart, J., concurring).

CONCLUSION

The petitioners respectfully request that this Court issue its writ of certiorari to review and reverse the judgment of the Wisconsin Supreme Court.

Dated this 21st day of January, 2003.

Respectfully submitted,

*THOMAS L. SHRINER, JR.
G. MICHAEL HALFENGER
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-5306
(414) 271-2400
Attorneys for The Abbey Harbor Condominium Association, Ltd.

WALTRAUD A. ARTS
1 South Pinckney Street
Madison, Wisconsin 53701-2113
(608) 283-2469
Attorneys for ABKA Limited Partnership

**Counsel of Record*

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ABKA LIMITED PARTNERSHIP, an Illinois limited partnership, Petitioner-Appellant-Petitioner,

The ABBEY HARBOR CONDOMINIUM ASSOCIATION, LTD., a Wisconsin nonprofit corporation, Petitioner-Co-Appellant-Petitioner,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES, Respondent-Respondent-Petitioner,

GENEVA LAKE CONSERVANCY, INC., and Oneida County, Respondents-Respondents.

WISCONSIN REALTORS ASSOCIATION, INC., Petitioner-Appellant-Petitioner,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES, Respondent-Respondent-Petitioner.

ABKA LIMITED PARTNERSHIP, AN ILLINOIS LIMITED PARTNERSHIP, Petitioner-Appellant-Petitioner,

The ABBEY HARBOR CONDOMINIUM ASSOCIATION, LTD., a Wisconsin nonprofit corporation, Petitioner Co-Appellant-Petitioner,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES, Respondent-Respondent-Petitioner.

WISCONSIN ASSOCIATION OF LAKES, INC., Petitioner-Appellant,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
Respondent-Respondent-Petitioner.

WISCONSIN REALTORS ASSOCIATION, INC.,
Petitioner-Appellant-Petitioner,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
Respondent-Respondent-Petitioner.

Supreme Court

No. 99-2306. Oral argument April 30, 2002. – Decided July 16, 2002.

(Affirming 2001 WI App 223, 247 Wis. 2d 793, 635 N.W.2d 168.)

2002 WI 106

(Also reported in 648 N.W.2d 854.)

BABLITCH, J., concurs.

SYKES, J., dissents.

PROSSER, J., joins.

WILCOX, J., took no part.

REVIEW of a decision of the Court of Appeals. *Affirmed.*

For petitioner-appellant-petitioner, ABKA Limited Partnership, and petitioner-co-appellant-petitioner, Abbey Harbor Condominium Association, Ltd., there were briefs by *Anthony S. Earl, Waltraud A. Arts* and *Quarles & Brady, LLP*, Madison, and *Thomas L. Shriner, Jr., G. Michael Halfenger, Jessica E. Price* and *Foley & Lardner*, Milwaukee, and oral argument by *Thomas L. Shriner, Jr.*

For petitioner-appellant-petitioner, Wisconsin Realtors Association, Inc., there were briefs by *Winston A. Ostrow, Donald L. Romundson* and *Godfrey & Kahn, S.C.*, Green Bay.

For petitioner-appellant, Wisconsin Association of Lakes, Inc., there was a brief by *William P. O'Connor, Mary Beth Peranteau* and *Wheeler, Van Sickle & Anderson, S.C.*, Madison, and oral argument by *William P. O'Connor*.

For respondent-respondent-petitioner, Wisconsin Department of Natural Resources, the cause was argued by *John S. Greene*, assistant attorney general, with whom on the briefs was *James E. Doyle*, attorney general.

Amicus curiae briefs were filed by *John A. Kassner* and *Brennan, Steil, Basting & MacDougall, S.C.*, Madison, on behalf of the Wisconsin Builders Association, and there was oral argument by *John A. Kassner*.

An amicus curiae brief was filed by *J. Bushnell Nielsen, Beth Ermatinger Hanan* and *Reinhart Boerner Van Deuren S.C.*, Milwaukee, on behalf of the Wisconsin Land Title Association.

An amicus curiae brief was filed by *Lawrence R. Heath*, corporation counsel, on behalf of Oneida County, Wisconsin.

An amicus curiae brief was filed by *Robert W. Larsen*, Monona, on behalf of the Lake Monona Sailing Club and the Yahara Lakes Association.

¶ 1. ANN WALSH BRADLEY, J. This case comes before us upon three petitions for review of a court of appeals decision reversing the circuit court order that affirmed an administrative law judge (ALJ) decision

allowing ABKA Limited Partnership to proceed with a "dockominium" project.[1] The court of appeals concluded that the conversion of a marina to a dockominium form of ownership as proposed by ABKA and the Abbey Harbor Condominium Association violates the public trust doctrine because it transfers ownership of public waters to private individuals.

¶ 2. We agree with the court of appeals that the ALJ erred and that ABKA's conversion of its marina to a condominium form of ownership violated the public trust doctrine. However, we determine that the reason ABKA violated the public trust doctrine was because it attempted to convey condominium property contrary to Wis. Stat. § 30.133 (1995-96),[2] which prohibits certain transfers of riparian rights. Accordingly, albeit with a different rationale, we affirm the court of appeals.

---

[1] *See ABKA Ltd. P'ship v. DNR*, 2001 WI App 223, 247 Wis.2d 793, 635 N.W.2d 168 (reversing an order of the Circuit Court for Walworth County, Michael S. Gibbs, Judge). The court of appeals defined "dockominium" as a "dockside community of privately owned boats moored in slips that are purchased for year-round living" or "[a] slip in such a community." *Id.* ¶ 44.

[2] Wisconsin Stat. § 30.133 provides:

> Prohibition against conveyance of riparian rights. (1) Beginning on April 9, 1994, no owner of riparian land that abuts a navigable water may convey, by easement or by a similar conveyance, any riparian right in the land to another person, except for the right to cross the land in order to have access to the navigable water. This right to cross the land may not include the right to place any structure or material in the navigable water.

All subsequent references to the Wisconsin Statutes are to the 1995-96 version unless otherwise indicated.

I

¶ 3. Development of the Abbey Harbor marina began in 1962 after a permit was granted for the dredging of uplands and dry marsh abutting Lake Geneva. Specifically, the permit was "to construct an enlargement of Geneva Lake as described herein, subject to the condition that the artificial waterway so constructed shall be a public waterway." The permit also stated that "a marina and boat-storage will be developed in the constructed waterway."

¶ 4. ABKA purchased the marina in 1973. Over time, and after additional permits, the marina came to include 407 boat slips. These permits provided: "The Department may change or revoke this permit if the project . . . becomes detrimental to the public interest." Until 1995, the slips were rented to the public on a seasonal basis.

¶ 5. In 1995, ABKA filed a condominium declaration in order to convert the marina into the condominium form of ownership under Wis. Stat. ch. 703. The declaration provided for the creation of 407 units, with a unit defined as a four-by-five-by-six inch "lock box" to be located in the Harbor House. The configuration was similar to a set of small post-office boxes. The unit definition in the declaration also provided that each unit would include "as an appurtenance, standard riparian rights of owners of waterfront real estate under Wisconsin Law, and the use of an assigned boat slip corresponding to the unit designation as a part of the common elements of THE ABBEY HARBOR CONDOMINIUM."

¶ 6. ABKA and the Department of Natural Resources (DNR) agreed that ABKA would apply to the DNR

for a permit authorizing the conversion of the marina into condominium property. The DNR received an objection to the permit application, alleging that the project violated Wis. Stat. ch. 30, the public trust doctrine, and the Wisconsin Constitution. Thus, a contested case hearing was held before an ALJ, pursuant to Wis. Stat. ch. 227.

¶ 7. In addition to ABKA and the DNR, a number of other entities and persons were made parties to the proceedings, including the Wisconsin Realtors Association, Inc., and the Wisconsin Association of Lakes (WAL). The Condominium Association became a co-applicant.

¶ 8. ABKA maintained that the DNR had no jurisdiction to regulate the conversion of its existing boat slips to a condominium form of ownership. The ALJ disagreed. Referring to the language in previous permits, the ALJ determined that "the DNR has jurisdiction over this matter given the plain language in the permits ('The Department may change or revoke this permit if the project obstructs navigation or becomes detrimental to the public interest.' [ ])." Also, relying on the DNR's regulatory authority pursuant to ch. 30, the ALJ determined that if all 407 boat slips were converted to private "dockominiums," the marina would exceed its reasonable use of the riparian frontage. In addition, the ALJ determined that the blanket approval of such a conversion would be detrimental to the public interest within the meaning of Wis. Stat. § 30.12.[3] Accordingly, the ALJ granted a permit, but

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[3] Wisconsin Stat. § 30.12(2) provides in part:

PERMITS TO PLACE STRUCTURES OR DEPOSITS IN NAVIGABLE WATERS; GENERALLY. The department, upon application and after proceeding in accordance with s.

(Continued on following page)

required that 287 of the slips remain as rentals. In reaching its decision, the ALJ observed, "[t]o some degree the dockominium concept involves a legal fiction: that ABKA is selling the lock-box condominium units, rather than the pier slips, for nearly $50,000."

¶ 9. The circuit court affirmed the ALJ, but the court of appeals reversed. The court of appeals did not address the question of DNR jurisdiction because it determined that ABKA had waived the right to challenge jurisdiction by agreeing to apply for a permit. In addressing the merits of the case, the court of appeals concluded that by permitting the conversion of the marina to private dockominiums as ABKA proposed, the DNR allowed control over navigable waters to be vested in private individuals in violation of the public trust doctrine.

¶ 10. The DNR, ABKA and the Condominium Association jointly (hereinafter "ABKA"), and the Realtors Association all petitioned this court for review. Several entities filed briefs as amici curiae.

II

¶ 11. Chapter 30 embodies a system of regulation of Wisconsin's navigable waters pursuant to the public trust doctrine. *Gillen v. City of Neenah,* 219 Wis. 2d 806, 828, 580 N.W.2d 628 (1998); *Waukesha County v. Seitz,* 140 Wis. 2d 111, 409 N.W.2d 403 (Ct. App. 1987). Although the

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30.02(3) and (4), may grant to any riparian owner a permit to build or maintain for the owner's use a structure otherwise prohibited under sub. (1), if the structure ... is not detrimental to the public interest.

public trust doctrine originally existed to protect commercial navigation, it has been expansively interpreted to safeguard the public's use of navigable waters for other purposes. *R.W. Docks & Slips v. State,* 2001 WI 73, ¶ 19, 244 Wis. 2d 497, 628 N.W.2d 781.[4]

¶ 12. Regulation and enforcement of this public trust rests with both the legislature and the DNR. *Borsellino v. DNR,* 2000 WI App 27, ¶ 17, 232 Wis. 2d 430, 606 N.W.2d 255 (Ct. App. 1999). The legislature has delegated to the DNR broad authority to regulate under the public trust doctrine and to administer ch. 30. *See State v. Town of Linn,* 205 Wis. 2d 426, 443-44, 556 N.W.2d 394 (Ct. App. 1996).

¶ 13. Section 30.133, as a provision in ch. 30, is included in the public trust doctrine and forms part of the basis for the DNR's jurisdiction over ABKA's proposed condominium project. It provides:

> Prohibition against conveyance of riparian rights. (1) Beginning on April 9, 1994, no owner of riparian land that abuts a navigable water may convey, by easement or by a similar conveyance, any riparian right in the land to another person, except for the right to cross the land in order to have access to the navigable water. This right to cross the land may not include the right to place any structure or material in the navigable water.

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[4] For a detailed discussion of the evolution of the public trust doctrine, see *Muench v. PSC,* 261 Wis. 492, 53 N.W.2d 514 (1952).

¶ 14. In addition to making other assertions, ABKA renews its jurisdictional arguments in this court, contending that neither § 30.133 nor any other part of the public trust doctrine as embodied in ch. 30 confers jurisdiction on the DNR to regulate the change in ownership of its marina. Similarly, the Realtors Association contends that the DNR does not have jurisdiction to "reopen" a valid permit under the public trust doctrine based only on a change in ownership.

¶ 15. Accordingly, this case presents a preliminary issue of the DNR's jurisdiction to regulate ABKA's conversion of its marina to a condominium form of ownership. Whether the DNR has jurisdiction to regulate is a question of law subject to independent appellate review. *Rusk County Citizen Action Group, Inc. v. DNR*, 203 Wis. 2d 1, 6, 552 N.W.2d 110 (Ct. App. 1996). We determine that the DNR has jurisdiction.

¶ 16. Contrary to what ABKA and the Realtors Association assert, this case is not about whether the DNR had authority to "reopen" a permit or whether ABKA had to seek a permit. These assertions ignore the DNR's statutory authority to enforce the public trust doctrine, the reality of the regulation process, and the facts of this case.

¶ 17. Pursuant to Wis. Stat. § 30.03(4), the DNR may bring an enforcement action when it learns of a "possible violation" of the public trust doctrine. Specifically, § 30.03(4) provides:

> (a) If the department learns of a possible violation of the statutes relating to navigable waters or a possible infringement of the public rights relating to navigable waters, and the department determines that the public interest

> may not be adequately served by imposition of a penalty or forfeiture, the department may proceed as provided in this paragraph, either in lieu of or in addition to any other relief provided by law. The department may order a hearing under ch. 227 concerning the possible violation or infringement, and may request the hearing examiner to issue an order directing the responsible parties to perform or refrain from performing acts in order to fully protect the interests of the public in the navigable waters.

¶ 18. Thus, to summarize the import of this statute for our purposes here: it provides that if the DNR "learns of a possible violation of the statutes relating to navigable waters," it may pursue an enforcement action "either in lieu of or in addition to any other relief provided by law." The DNR may then request the ALJ to issue an order directing the responsible parties to "perform or refrain from performing acts." Essentially, under § 30.03(4), the DNR has jurisdiction to pursue any "possible violation" of the public trust doctrine as embodied in ch. 30, and it may request broad injunctive-type relief.

¶ 19. There were several possible violations of the public trust doctrine, as is apparent from the issues addressed in the ALJ's decision. ABKA's dockominium project may have been exceeding its reasonable use of the State's navigable waters, may have been detrimental to the public interest as that concept is used in ch. 30, or, as illustrated by the arguments before the ALJ, may have run afoul of § 30.133. In addition, as the ALJ determined, two of the permits that ABKA held specifically recognized DNR's jurisdiction to change or revoke the permit "if the project . . . becomes detrimental to the public interest."

¶ 20. The DNR explains in its brief that despite its authority under § 30.03(4), in reality it often will agree with a party to proceed under the permit process: "Encouraging persons to proceed with the disputed activities and await enforcement actions risks inviting damage that cannot be undone by after-the-fact remedies."

¶ 21. This apparently is what happened in this case. After the DNR received information about ABKA's dockominium project, counsel for the DNR sent a letter to counsel for ABKA, the key portions of which were as follows:

> As you know, the Department received information last week that boat slips at the Abbey Harbor adjacent to Lake Geneva were being sold as "condominiums." I discussed this with you on November 30, 1994, and indicated that if "condominium units" were defined in such a way that they included public navigable waters this would be a *violation of the public trust doctrine* and would be of concern to the Department.
>
> . . . I advised you by phone message on December 5, 1994, that the Purchase Agreement did not address our concerns about the definition of the condominium units that I had previously discussed with you and asked that you provide to us the "condominium plat and condominium declaration."
>
> You supplied the Abbey Harbor Condominium Declaration. . . . Upon review of these materials, it is clear there are significant problems with this condominium declaration since it includes, as part of the condominium units for which purchasers are purported to be given fee

> simple title and control, portions of the public navigable waters of the State of Wisconsin.
>
> . . . .
>
> We have referred this matter to the Attorney General's office and . . . [t]heir initial reaction to these documents is consistent with our interpretation. *The State of Wisconsin will, if necessary, initiate action to stop the purported sale of public trust waters to private individuals and to have any transactions which may have already occurred invalidated.*
>
> The Department will also be reviewing the permits which have been issued for the marina structures in this area. There are questions raised by these transactions and proposed transactions relative to who are "riparian owners or proprietors" who can continue to maintain pier structures in this marina area.

(Emphasis added.)

¶ 22. Pursuant to the DNR's request, ABKA made changes in its condominium declaration. Relying on the DNR's approval of the declaration, ABKA continued with its project and agreed to proceed with the permit process. However, the agreement with the DNR provided: "Nothing in this agreement limits the authority of the administrative law judge to hear and decide this matter on any legal basis presented at the hearing or by any party or raised *sua sponte* by the administrative law judge."

¶ 23. In the ensuing contested case hearing held according to ch. 227, the DNR did not take the position that ABKA's dockominium project violated § 30.133, but intervening parties did. The ALJ resolved the case by

determining that ABKA had exceeded its reasonable use of the water and that its dockominium project was detrimental to the public interest. However, consistent with the possible bases for a violation of the public trust doctrine, the ALJ recognized that one of the issues was "whether the Condominium Declaration violates sec. 30.133, Stats."

¶ 24. What ABKA's and the Realtors Association's arguments fail to recognize is that for purposes of our determination of DNR jurisdiction, it is of no consequence that ABKA proceeded with the permit process under § 30.12 or that the ALJ chose to base its decision on one ground or another. The DNR's jurisdiction was triggered under § 30.03(4) because ABKA's conversion of its marina to a condominium form of ownership presented several possible violations of the public trust doctrine.[5]

¶ 25. The court of appeals, in contrast, concluded that ABKA waived its right to challenge the DNR's jurisdiction by the act of applying for a permit. We turn briefly to discuss the waiver issue.

¶ 26. None of the parties, including the DNR, supports the court of appeals decision on waiver. We agree with the parties that the court of appeals decision as to waiver was incorrect. "The jurisdiction of administrative agencies is always open for judicial review." *Kennedy v. DHSS,* 199 Wis. 2d 442, 448, 544 N.W.2d 917 (Ct. App.

[5] The dissent, like ABKA and the Realtors Association, misunderstands the jurisdictional question, and therefore mischaracterizes the jurisdictional issue as solely one of "jurisdiction to require a new permit." Dissent at ¶ 91. The question is not solely whether the DNR has jurisdiction to require a new permit, but whether its authority was triggered by a possible violation of the public trust doctrine.

1996) (citing *Union Indem. Co. v. Railroad Comm'n,* 187 Wis. 528, 538, 205 N.W. 492 (1925)).

¶ 27. The only case the court of appeals cited for its waiver rule was *Sterlingworth Condo. Ass'n v. DNR,* 205 Wis. 2d 710, 556 N.W.2d 791 (Ct. App. 1996). However, the portion of *Sterlingworth* the court of appeals cited stands only for the proposition that by electing to continue with a permit hearing rather than risking an enforcement action, the applicant accepts the burden of proof as to whether what the applicant seeks is detrimental to the public interest. 205 Wis. 2d at 726-27. Nothing in *Sterlingworth* should be read for a rule that a party is unable to retain the right to challenge DNR jurisdiction upon filing of a permit application.

III

¶ 28. Having determined that the DNR had jurisdiction, we turn to the merits of this case. Both the ALJ and the court of appeals majority discussed ABKA's condominium units as a "legal fiction." In the ALJ's decision, 29 of the 92 findings of fact addressed the condominium form of ownership and the rights of condominium owners as set forth in the condominium declaration. The ALJ concluded, however, that the condominium declaration was not a violation of § 30.133.

¶ 29. The central issue we address is whether the ALJ correctly concluded that ABKA's attempt to convey condominium property did not violate § 30.133. In addressing this issue, we must interpret and apply ch. 703, Wisconsin's condominium statute, as well as § 30.133. The interpretation and application of statutes is a question of law for this court's independent determination. *Auman v.*

School Dist. of Stanley-Boyd, 2001 WI 125, ¶ 6, 248 Wis. 2d 548, 635 N.W.2d 762.

¶ 30. Our review of an agency decision is the same as the circuit court's. *Boynton Cab Co. v. DILHR,* 96 Wis. 2d 396, 405, 291 N.W.2d 850 (1980). We are not bound by an agency's conclusions of law. *UFE Inc. v. LIRC,* 201 Wis. 2d 274, 285, 548 N.W.2d 57 (1996). To the contrary, "[t]he court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law." Wis. Stat. § 227.57(5). Although we give due weight or great weight deference to agency conclusions of law when appropriate, here the interpretation of § 30.133 presents a question that is "clearly one of first impression" and thus warrants no deference. *UFE,* 201 Wis. 2d at 285.

¶ 31. In resolving the issue before us, we rely on several statutes in ch. 703, but principally the statute that defines a condominium "unit," Wis. Stat. § 703.02(15). Our interpretation of the Wisconsin condominium statutes is aided by a comparison to the Uniform Acts, which Wisconsin has not adopted. Applying these statutes and § 30.133 to ABKA's dockominium project, we conclude that the ALJ erred in approving the attempted conversion because the project was a conveyance of riparian rights in violation of § 30.133.

A.

¶ 32. A "condominium" is defined as "property subject to a condominium declaration established under this chapter." Wis. Stat. § 703.02(4). The declaration is "the instrument by which a property becomes subject to this chapter." § 703.02(8).

¶ 33. The basic types of ownership interests in a condominium consist of the "unit" and the "common elements." The "unit" is:

> a part of a condominium intended for any type of independent use, including one or more cubicles of air at one or more levels of space or one or more rooms or enclosed spaces located on one or more floors (or parts thereof) in a building.

§ 703.02(15).[6] Common elements are "all of a condominium except its units." § 703.02(2). A common element is a "limited common element" if it is "identified in a declaration or on a condominium plat as reserved for the exclusive use of one or more but less than all of the unit owners." § 703.02(10). A unit, together with its undivided interest in the common elements, constitutes real property. Wis. Stat. § 703.04.

¶ 34. ABKA's declaration language as approved by the DNR defines a unit as a lock box that includes, as an appurtenance, riparian rights and the use of a boat slip. The "unit" is:

> that separate area of the condominium intended for independent, private use, comprised of a cubicle of space defined by a "Lock Box" located within the Harbor House as shown in the Condominium Plat. . . . The dimensions of each unit shall be approximately four (4) inches in width, five (5) inches in height, and six (6) inches in length. Each unit shall include as an appurtenance, standard

[6] "A unit may include 2 or more noncontiguous areas." Wis. Stat. § 703.02(15).

> riparian rights of owners of waterfront real estate under Wisconsin Law, and the use of an assigned boat slip corresponding to the unit designation as a part of the common elements of THE ABBEY HARBOR CONDOMINIUM.

¶ 35. The declaration lists the common elements as:

> all of THE ABBEY HARBOR CONDOMINIUM, real property, and real property interests, improvements and appurtenances as described in this Declaration, except the individual units . . . and shall include . . . the marina shoreline, sea wall and sidewalk along said shoreline . . . all docks, boardwalks, piers and pilings contained within the marina . . . the Harbor House, outdoor swimming pool, boat launching ramp . . . and any and all other parts or elements of the condominium Property as described in this Declaration. . . .

The section of the declaration describing which elements are limited common elements includes the following provision:

> Boat Slips. Each unit owner, as a limited common element appurtenant exclusively to his unit, shall have riparian rights to use of the space beside the pier or piers corresponding to his unit number as shown in the Condominium Plat, for use as a boat slip.

¶ 36. Examining the condominium statutes in light of ABKA's dockominiums, we begin with the statutory definition of unit. As previously noted, the statutory definition of unit states that it is a "part of a condominium intended for any type of independent use, including one or more cubicles of air at one or more levels of space or one or

more rooms or enclosed spaces located on one or more floors (or parts thereof) in a building." § 703.02(15). Our focus is on the language providing that the unit must be "intended for any type of independent use."

¶ 37. The requirement in § 703.02(15) that the unit be "intended for any type of independent use" must be read with Wis. Stat. §§ 703.05 and 703.09(1). Section 703.05 states:

> Ownership of units. A unit owner is entitled to the exclusive ownership and possession of his or her unit.

Section 703.09(1) provides:

> (1) A condominium declaration shall contain:
>
> . . . .
>
> (g) Statement of the purposes for which the building and each of the units are intended and restricted as to use.

Reading these statutes together, we derive a number of rules and principles.

¶ 38. First, the types of uses for which condominiums may be created are potentially broad, provided that the condominium otherwise complies with the other statutory requirements. For example, the condominium form of ownership apparently has been applied to aircraft hangars as well as grain storage bins. *Wisconsin Condominium Law Handbook* §§ 12.22A and 12.22B, Supp. 12-2 (1997).

¶ 39. Second, despite the potential breadth of the statute, its application is limited by statutory language

that the condominium unit be "intended for . . . independent use." The reference to "independent use" does not operate only to describe the exclusive ownership interest in the unit. If that were so, § 703.05 would be unnecessary. Likewise, § 703.05 shows that the legislature used the term "exclusive," not "independent," to refer to an owner's separate ownership interest. Accordingly, the phrase "independent use" refers to something more than the concept of exclusive ownership.

¶ 40. Third, the purpose for which the units are intended must be stated in the declaration. That each unit must have a stated purpose also reinforces the conclusion that "independent use" in § 703.02(15) refers to something more than exclusive ownership of the unit.

¶ 41. Any condominium in Wisconsin must comply with these rules and principles. In addition, it is axiomatic that the use for which units are intended along with their purpose as stated in the declaration must comply with other applicable law.

¶ 42. Our interpretation of the statutory definition of "unit" and its application to this case is also aided by a comparison to the Uniform Condominium Act and its variant, the Uniform Common Interest Ownership Act. The Uniform Acts have not been adopted in Wisconsin.

¶ 43. The Uniform Condominium Act provides that a "unit" is a "physical portion of the condominium designated for separate ownership or occupancy." 7 U.L.A. Part II, § 1-103(25), p. 217 (Master ed. 1997). Similarly, the Uniform Common Interest Ownership Act defines a "unit" as a "physical portion of the common interest community designated for separate ownership or occupancy." 7 U.L.A. Part I, § 1-103(31), p. 482.

¶ 44. More important for our purposes, these definitions of unit define "condominium" and "common interest community" as "real estate," which under the Uniform Acts is "*any* leasehold or other estate or interest *in, over, or under land,*" and includes "parcels with or without upper or lower boundaries, and spaces that may be filled with air or *water.*" 7 U.L.A. Part II, § 1-103(7) and (21), p. 215-16; 7 U.L.A. Part I, § 1-103(7) and (26), pp. 479, 481 (emphasis added). Thus, under the Acts, a unit may be any physical portion of any interest in, over, or under land, including spaces filled with air or water.

¶ 45. Wisconsin's definition of unit makes the unit a part of the condominium "property," which is defined in ch. 703 as "unimproved land, land together with improvements on it or improvements without the underlying land." § 703.02(14). Thus, in addition to providing a qualitatively different definition of the type of property that may become a unit, Wisconsin's condominium statutes are without reference to water or interests in it, unlike the Uniform Acts.

¶ 46. Wisconsin's condominium statutes were enacted in 1963 and modeled after the Federal Housing Authority Model Condominium Statute of 1961. *Wisconsin Condominium Law Handbook* at § 1.4, p. 1-5. This model statute was designed primarily for high-rise developments. *Id.*

¶ 47. In 1977, the condominium statutes were replaced to provide more flexibility in the development, creation, and operation of condominiums. *Wisconsin Condominium Law Handbook* at § 1.4, p. 1-5; *see also* ch. 407, Laws of 1977. Nonetheless, the key language in the definition of "unit" remained unchanged. *See* Wis. Stat.

§ 703.02(1) (1975).[7] The statute has always required that the unit be intended for "independent use."

¶ 48. In short, Wisconsin's definition of unit, particularly when juxtaposed with the Uniform Acts, reveals no legislative intent to permit a boat slip to be conveyed as a condominium unit. Considering this, and applying the rules and principles from the condominium statutes, we determine that four-by-five-by-six inch lock boxes are not "intended for any type of independent use" within the meaning of § 703.02(15). Rather, they are phantom units that do not meet with the statutory definition.

¶ 49. In contrast to the lock boxes, ABKA's boat slips clearly are intended for a type of independent use: docking a boat. However, the slips are not the units under ABKA's declaration. They are limited common elements. Under ABKA's declaration, the four-by-five-by-six inch lock boxes are the units.[8] Although the lock boxes may be intended for exclusive ownership and possession by the unit owner, that does not mean they are "intended for any type of independent use" within the meaning of the statute.

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[7] The definition formerly read in full:

> "Unit" means a part of the property subject to this chapter intended for any type of independent use, including one or more cubicles of air at one or more levels of space, or one or more rooms or enclosed spaces located on one or more floors (or parts thereof) in a building, and with a direct exit to a public street or highway or to a common area or limited common area leading to such a street or highway.

Wis. Stat. § 703.02(1) (1975).

[8] A photograph of the lock boxes is attached at the end of this opinion.

¶ 50. That the lock boxes are not intended for any type of independent use is illustrated by the fact that the declaration lacks a statement describing the purpose or use of the units apart from their appurtenant boat slip. The declaration states that the "units and their appurtenant boat slips in THE ABBEY HARBOR CONDOMINIUM are designated for either recreational uses and purposes or commercial uses and purposes, as set forth in Section 10 herein." Section 10 provides: "The Condominium units and appurtenances in THE ABBEY HARBOR CONDOMINIUM are intended for and restricted to marina, storage, boat slip and related recreational uses as governed by the terms and conditions contained herein and the By-Laws of the Association."

¶ 51. It is a sham to suggest that these four-by-five-by-six inch lock boxes are being conveyed for such independent uses as stated in the declaration. They exist for the purpose of conveying the common elements and appurtenant riparian rights. A unit cannot serve primarily as a conduit for another use.

¶ 52. Any assertion that the four-by-five-by-six inch cubicles are intended for any type of independent use is belied by ABKA's marketing materials for the dockominiums. Marketing materials used by ABKA do not feature or even describe the lock boxes. Rather, they refer to "slip ownership" and include a brochure promoting "a place on the lake . . . to call your own. . . . " The brochure prominently features a definition of "dockominium" as "individual ownership of the right to use the waterway bordered by a pier and catwalks held in joint dominion (as in a marina)."

¶ 53. We agree with the ALJ's finding:

> Unlike other condominium units, the lock box itself does not inherently have much value. The value of the "dockominiums," as the Abbey has marketed these unique condominium units, is largely due to the other amenities that are at this location and are part of the individual common area.

(Citations omitted.) The court of appeals majority also agreed. It concluded that "unlike most condominium units, the lock-box itself has no inherent value; rather, the appurtenant rights attached to the conveyance are the valuable commodity." *ABKA Ltd. P'ship v. DNR,* 2001 WI App 223, ¶ 43, 247 Wis. 2d 793, 635 N.W.2d 168.

¶ 54. As WAL notes, ABKA at one time platted the boat slips themselves as the "units" for its condominium project. This fact also persuades us that the lock boxes are not intended for any type of independent use by the owner.

¶ 55. In short, ABKA's condominium declaration as approved by the DNR fails to create valid units under § 703.02(15) because the units defined in ABKA's declaration have no independent use. Because there are no valid units, there is not a valid condominium conveyance of real property.

B.

¶ 56. Without a valid condominium unit, the transfer of riparian rights that ABKA's declaration purports to accomplish is in violation of § 30.133, which provides that "no owner of riparian land that abuts a navigable water may convey, by easement or by a similar conveyance, any

riparian right in the land to another person, except for the right to cross the land in order to have access to the navigable water." In analyzing why the transfer that ABKA has attempted violates § 30.133, some additional background on riparian rights law is necessary.

¶ 57. Riparian owners are those who have title to the ownership of land on the bank of a body of water. *Ellingsworth v. Swiggum,* 195 Wis. 2d 142, 148, 536 N.W.2d 112 (Ct. App. 1995). A riparian owner is accorded certain rights based upon title to the ownership of shorefront property. *Sea View Estates Beach Club, Inc. v. DNR,* 223 Wis. 2d 138, 157, 588 N.W.2d 667 (1998). These rights are well defined and, though subject to regulation, include the right to use the shoreline and have access to the waters, the right to reasonable use of the waters for domestic, agricultural and recreational purposes, and the right to construct a pier or similar structure in aid of navigation. *See id.* A riparian owner is entitled to exclusive possession to the extent necessary to reach navigable water and to have reasonable access for bathing and swimming. *Id.*

¶ 58. One water rights treatise explains, "every state has accepted at least some form of transferring riparian rights apart from the land that gave rise to the rights." *Water and Water Rights* § 7.04, p. 7-91 (Robert E. Beck, ed. 2001). However, "most courts have not accepted the full transferability of riparian rights." *Id.* at 7-92. Instead, "courts have evolved complex rules that vary from state to state to define the extent to which riparian rights might be transferred and to protect the interests of those who will be affected by the transfer even though not direct parties to the transfer." *Id.*

¶ 59. With that background on riparian rights law in mind, we turn to § 30.133 and the proper application of its language prohibiting the transfer of riparian rights "by easement or by a similar conveyance." We begin by noting that riparian rights have been characterized to be, in some senses, like an easement:

> Under common law in most states, the riparian rights are an interest in real estate, somewhat like an easement, that is, the right to use land. Unlike an easement, however, riparian rights in many states can be severed from the uplands to which they were originally appurtenant, and can be sold to others.

Gurdon H. Buck, *Dockominium Documents,* C833 ALI-ABA 261, 264 (1993). The way that the quoted source distinguishes riparian rights from an easement goes to the heart of § 30.133.

¶ 60. Section 30.133 was the legislature's response to *Stoesser v. Shore Drive P'ship,* 172 Wis. 2d 660, 668, 494 N.W.2d 204 (1993), in which this court concluded that "Wisconsin follows the general rule that riparian rights can be conveyed to non-riparian owners by easement." The legislature did not agree with the court's conclusion. The fiscal analysis in the drafting file for the act that created § 30.133 notes that while the statute would have little or no fiscal effects, it had "significant policy implications."

¶ 61. Wisconsin's approach under § 30.133 has been identified as unique:

> Many people assume that one can convey the riparian rights apart from the land just as readily as one could convey riparian land without the appurtenant riparian rights. . . . More and more

> states have now come to accept that such grants are effective to some extent, with the effect varying, depending on whether the rights sought to be conveyed relate to consumptive or nonconsumptive uses. *Wisconsin, on the other hand, has now expressly prohibited the conveyance of riparian rights, effective April 9, 1994.* Presumably this means apart from the conveyance of riparian land.

Water and Water Rights at § 7.04(a)(3), pp. 7-97 – 7-98 (footnotes omitted).

¶ 62. Nonetheless, ABKA asserts that § 30.133 does not apply because its dockominium owners own riparian property in common. Similarly, the Realtors Association asserts that § 30.133 has nothing to do with the condominium form of ownership. We disagree with both assertions.

¶ 63. ABKA's argument implicitly recognizes that § 30.133 prohibits the conveyance of riparian rights apart from riparian property. It relies on the premise that the purchasers of its phantom units own riparian property in common in asserting it has not violated § 30.133. However, the purchasers of ABKA's phantom units do not own riparian property in common because there has been an incomplete condominium conveyance under the condominium statutes. Under § 703.04,[9] it is the "unit, together with its undivided interest in the common elements" that constitutes "real property." Without a valid unit, the unit "owners" do not hold real property, and the declaration is

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[9] Wisconsin Stat. § 703.04 provides in full:

> A unit, together with its undivided interest in the common elements, for all purposes constitutes real property.

left to convey nothing more than riparian rights unattached to any real property interest.

¶ 64. Without a valid unit, that is, a unit with an independent use, what is left is an attempt to convey riparian rights not by easement, but "by a similar conveyance" in violation of § 30.133. Under § 30.133, riparian rights must be conveyed as attached to something; here, they are attached to nothing. ABKA is attempting to convey riparian rights qua riparian rights. Conveyances of property and property rights are circumscribed by state statutes and regulations.

¶ 65. Here, contrary to what ABKA and the Realtors Association asserts, ABKA's conveyance of riparian rights to dockominium owners is in violation of § 30.133.[10] The ALJ made an erroneous determination of law when it concluded to the contrary. See § 227.57(5).

¶ 66. Under the Uniform Acts and some other states' statutes, such forms of dockominiums may be permissible. For example, the Ohio condominium statutes include the following provision:

> "Unit," in the case of a water slip, means a part of the condominium property consisting of the land under a portion of the water in a water

[10] In stating that our decision stands for the proposition that "a condominium is essentially the equivalent of an easement," the dissent paints with far too broad a brush. Dissent at ¶ 111. We do not determine that a condominium is "essentially the equivalent of an easement." Our holding is much narrower: an attempt to transfer riparian rights attached to invalid condominium units is an attempt to transfer riparian rights by a conveyance similar to an easement, and thus a violation of § 30.133.

> slip . . . and designated as a unit in the declaration. . . .

Ohio Rev. Code Ann. § 5311.01(I)(2) (2002).

¶ 67. Such is not the state of the law in Wisconsin. Our condominium statutes, unlike the Uniform Acts or the Ohio statute, require an independent use. Unlike other states, Wisconsin also has § 30.133, which greatly limits the transfer of riparian rights separate from the shoreland to which the rights attach. If the law is to change, the legislature must act. It is free to amend the condominium statutes or § 30.133, though as always, within constitutional limits.

¶ 68. We note that residential condominium units that provide for the use of boat slips are readily distinguishable from ABKA's lock boxes. Residential condominium units are intended for a type of independent use. Their true purpose, living space for human beings, may readily and accurately be stated in a condominium declaration. Such units would comply with the statutory definition of "unit," would allow for a valid condominium conveyance, and would create common interest ownership in riparian property. Therefore, residential units that provide for the use of a boat slip would not contravene § 30.133.

IV

¶ 69. In sum, we determine that the DNR had jurisdiction over ABKA's conversion of its marina to a condominium form of ownership. We also determine that the ALJ erred in approving this attempted conversion because it was a conveyance of riparian rights in violation

of § 30.133. Accordingly, albeit on different grounds, we affirm the court of appeals.

By the Court. – The decision of the court of appeals is affirmed.

¶ 70 JON P. WILCOX, J. did not participate.

[Picture Omitted in Printing]

¶ 71. WILLIAM A. BABLITCH, J. (*concurring*).

First, it is important to note what this case is *not* about. It is *not* as one commentator stated – *see* Ray Rivard, *Who Will Guard the Guards?,* Lakeland Times (Minocqua, Wisconsin), June 21, 2002, at 11-12 – about whether private docks and piers belong to the state or the private owner. This case involves the concept of multi-owners of one dock or pier, known as dockominiums, and it does not touch upon individual docks and piers as they are generally known today.

¶ 72. Also, it is *not* about allowing a non-property owner to cross private property to access the water, as alleged by the same concerned commentator. This case does not touch upon the right of private property owners to keep whomever they want off their property.

¶ 73. What this case *is* about is the right of joint riparian owners who are part of a condominium to place a dockominium, owned jointly by the owners on the public waters abutting their property. Most significantly, and why I concur, it is about whether condominium owners have a riparian zone significantly smaller than could exist under any other form of real property ownership, and thereby have a right to construct and operate a dock or docks that no other private landowner would be allowed.

¶ 74. I join the majority opinion, notwithstanding my belief that the majority opinion does not go far enough. I would prefer the holding of the court of appeals: dockominiums are a per se violation of the public trust doctrine. Putting it another way, I would hold that the conveyance of dockage rights pursuant to a condominium agreement is a conveyance that is forbidden under Wis. Stat. § 30.133(1). I reach this conclusion for a simple reason: allowing one riparian owner to divide the owner's riparian zone and separately convey legal interest in the resulting "lots" will have significant detrimental effect on the public waters of this state. This concept was well expressed in the brief of the Wisconsin Association of Lakes, Inc., which stated: "No statute has ever expressly authorized a riparian owner to fractionalize the riparian zone. . . . Until this case arose, no court had ever considered whether a riparian has an implied right to do so. . . . Subdivision of the riparian zone is beyond the reasonable use rights of riparian owners."

¶ 75. The dissent misses the mark when it asserts, in passing, that the only change here was a change in ownership. That is akin to the old saw: "Besides that Mrs. Lincoln, how did you enjoy the play?" The change in ownership is critical because the change involves going from one owner with riparian rights to potentially 407 owners with riparian rights of ownership in the dock. That is a fact that the dissent minimizes, but to me it is the most significant of all.

¶ 76. State law as well as local ordinances mandate minimum lot widths on lakes, varying from 65 feet to 200 feet or more. This of course greatly limits the number of piers and docks allowable on the shoreline. The concept of allowing a riparian owner to fractionalize the owner's

riparian rights subverts this policy. Again, as stated by the Wisconsin Association of Lakes, Inc., "excessive fragmentation of the riparian zone is detrimental to the public interest."

¶ 77. It is axiomatic that the public waters of this state belong to the public. The public is entitled to the full reasonable use and enjoyment of these waters, including the enjoyment that comes with the natural beauty of the waters. One can easily imagine the damage to the aesthetic appeal of our public waters if this concept is allowed. Most lakes in this state are far smaller than the 5,262 acres of Geneva Lake. Imagine the damage to the aesthetic appeal of allowing a single property owner on a 250-acre lake the right to condominiumize his or her 200 feet of frontage and then provide his or her riparian rights of dockage to the resultant numerous owners. The court avoided the fundamental issue this time, but it will be back.

¶ 78. It is a very slippery slope ABKA invites us to navigate. I would respectfully refuse the invitation.

¶ 79. DIANE S. SYKES, J. (*dissenting*). A majority of this court, like the majority in the court of appeals, has completely invalidated the Abbey Harbor Condominium Declaration. The majority in the court of appeals did so by declaring the entire "dockominium" concept to be a per se violation of the public trust doctrine. The majority here does so because it considers the condominium units to be invalid under the condominium statute's definition of "unit," Wis. Stat. § 703.02(15), so that they are nothing more than "sham" conduits for the illegal conveyance of riparian rights "by easement or by a similar conveyance"

in violation of the public trust principles embodied in Wis. Stat. § 30.133.

¶ 80. Although it does not explicitly say so, by invalidating the condominium declaration, the majority extinguishes the real property rights of the 185 condominium owners who purchased "dockominiums" at the Abbey Harbor Marina. According to the majority opinion, those persons – heretofore condominium owners – have paid for, mortgaged, recorded title to, paid taxes on, insured, and (for the last six years) possessed and used, *precisely nothing,* because what they might otherwise have reasonably assumed was real property (because the statutes say so) was actually nothing more than a collection of "phantom units" unrecognized by the law (because a majority of this court now says so).

¶ 81. Incredibly, the majority obliterates the property rights of these condominium owners in the context of a Chapter 227 judicial review of a DNR permit proceeding under Wis. Stat. § 30.12 – a proceeding which the DNR had no statutory jurisdiction or authority to convene in the first place (more about that later). The majority has therefore not confined itself to merely affirming or reversing a regulation, restriction, or condition on a real property owner's use or improvement of his property, which is the usual business of land use regulatory agencies like the DNR, and which ordinarily defines the legitimate boundaries of judicial review of an agency's actions. The majority has instead used this permit proceeding as a vehicle to invalidate the entire condominium declaration itself, and therefore has eliminated each condominium owner's *entire real property interest.*

¶ 82. The majority has adopted an analysis that will in large part be unrecognizable to the participants in this proceeding. Certainly the court has the discretion to decide a case on grounds not advanced by the parties, but it should generally do so only when the law clearly requires it, which is hardly the case here. In any event, doing so in this case is simply not credible.

¶ 83. The DNR never argued that Wis. Stat. § 30.133 outright prohibits these condominiums, much less provides a basis for its exercise of permit jurisdiction. The Wisconsin Association of Lakes referenced Wis. Stat. § 30.133 only in passing in its brief in this court, and did not argue it here as grounds for denial of the permit. The Lake Monona Sailing Club, in its amicus curiae brief, invoked the statute with a little more fanfare, but not much. The administrative law judge ("ALJ") firmly rejected any suggestion that Wis. Stat. § 30.133 was implicated *at all* – either as a basis for the DNR's permit jurisdiction or substantively. And *not a single party* in this multiple-party, hotly contested permit proceeding *ever* argued that the condominium units at the Abbey Harbor Marina did not meet the definition of "unit" under Wis. Stat. § 703.02(15), or that the condominium declaration was otherwise invalid under Chapter 703.

¶ 84. Clearly, the majority disapproves of "dockominiums," but apparently could not find anything persuasive in the arguments of those who oppose this particular form of marina ownership upon which to base its decision. What else could explain the majority's excursion into a novel theory asserted by no one? If anyone thought for a minute that these condominium units were invalid under Wis. Stat. § 703.02(15), we surely would have heard about it. The DNR and the ALJ both rejected the idea that Wis.

Stat. § 30.133 was at all significant: it occupies two numbered paragraphs of the ALJ's opinion, which otherwise contains 92 numbered paragraphs of factual findings and 26 numbered paragraphs of legal conclusions, as well as a lengthy analysis.

¶ 85. We accepted review in this case on three highly important issues of state-wide impact, roughly paraphrased as follows: 1) does the filing of a permit application with an administrative agency while specifically objecting to the agency's jurisdiction and having obtained the agency's express agreement that the jurisdictional issue is not waived, nevertheless waive any objection to the agency's jurisdiction; 2) does the DNR have jurisdiction or authority under Wis. Stat. § 30.12 to require the owner of a validly permitted marina to apply for a new permit when the ownership of the marina changes to condominium form; and 3) is the condominium form of ownership or the condominium declaration in this case inconsistent with the public trust doctrine? The majority properly answers the first question "no." The majority's resolution of the latter two issues is seriously flawed.

¶ 86. The majority omits some important factual and procedural background, and sidesteps much of the legal analysis necessary to a proper resolution of the jurisdictional and public trust doctrine issues in this case. Abbey Harbor is a private, not public, marina, although it has always maintained a public boat launch. The marina's 407 boat slips were built pursuant to properly-issued permits that were not conditioned on maintaining seasonal rentals, not dependent in any way on the marina's ownership form, and not subject to any particular restrictions as to use or operation of the marina.

¶ 87. A majority of boaters who rented slips did so year after year; 85 percent of the slips had been rented for more than one year, 42 percent for more than ten years, 20 percent for more than 15 years. In addition to the docks, piers, and boat launch, the marina also includes 20 acres of upland real estate, a Harbor House, a seawall, a sidewalk, parking lots, a swimming pool, and 4,193 feet of shoreline on a man-made lagoon adjoining Lake Geneva that was created when the marina was first developed.

¶ 88. The condominium conversion involved a change of ownership only. It did not involve a change in use or any physical changes whatsoever at the marina. There is no change in the number, size, configuration, or layout of the marina or its docks, piers, or slips. No new docks, slips, piers, or structures of any kind were placed on the bed of the harbor as a result of the condominium conversion. There is no effect on the size or type of boat that can be moored at the marina. The conversion does not alter or impede navigational channels or safety in the harbor. It has no adverse environmental impact on wildlife, water quality or pollution, flood flow capacity, fisheries, or the natural scenic beauty of the lake.

¶ 89. The Abbey Harbor Condominium Declaration defines the condominium "units" as the individual lockboxes in the Harbor House, together with the standard riparian rights associated with ownership of waterfront property. It also provides that condominium owners own, as tenants in common, all of the real property and improvements at the marina, including the upland real estate, the shoreline, the seawall, the Harbor House, the sidewalk, the parking lots, the swimming pool, and the docks and piers, as condominium "common elements." The slips are denominated as "limited common elements" for

purposes of allocating the right of exclusive use of individual slips among the condominium unit owners.

¶ 90. The ALJ included all of the foregoing in his findings of fact, and we are required to review factual findings deferentially. *See* Wis. Stat. § 227.57(6) (reviewing court "shall not substitute its judgment for that of the agency as to the weight of the evidence" and does not disturb factual findings that are supported by "substantial evidence in the record"). "[T]he test is whether, taking into account all the evidence in the record, 'reasonable minds could arrive at the same conclusion as the agency.'" *Responsible Use of Rural and Agricultural Land v. Public Service Comm'n and DNR*, 2000 WI 129, ¶ 20, 239 Wis. 2d 660, 676, 619 N.W.2d 888; *see also Sea View Estates Beach Club v. DNR*, 223 Wis. 2d 138, 148, 588 N.W.2d 667 (Ct. App. 1998).

¶ 91. ABKA vigorously objected to the DNR's insistence that the condominium conversion required a new permit, inasmuch as nothing was changing at the marina besides its ownership. The parties negotiated the following compromise: ABKA would accede to the DNR's demand that it apply for a new permit under Wis. Stat. § 30.12 (the condominium association would later join as co-applicant); ABKA's objection to the DNR's jurisdiction to require a new permit was expressly preserved and would be an issue before the ALJ; ABKA was authorized to immediately begin selling 292 condominium units; 125 slips would be held back from sale and maintained as seasonal rentals pending the outcome of the permit proceeding, and if the ALJ required a greater number of set-asides for seasonal rental, ABKA would if necessary buy back the required number of condominium units.

¶ 92. At the time of the hearing, 185 condominium units at Abbey Harbor had been sold. The permit issued by the ALJ and affirmed by the circuit court authorized only 120 condominium units, and required ABKA to set aside 287 slips for seasonal rental, for terms not exceeding five years, for a "reasonable fee." The permit also imposed a requirement that the availability of rental slips be advertised "in the local newspaper of greatest circulation at least twice each spring," and that ABKA maintain a waiting list, and make that waiting list available for inspection by the DNR.

¶ 93. The threshold jurisdictional issue here is significant. Rather than deal with it directly, the majority manipulates it in order to facilitate the majority's preferred resolution, and then has the audacity to suggest that this dissent "misunderstands the jurisdictional question." Majority op. at ¶ 24 n.5.

¶ 94. I am compelled, therefore, to quote from *this court's order* accepting review insofar as it states the jurisdictional issue: "Has the legislature given the DNR authority in Wis. Stat. § 30.12 to require the owner of a permitted marina to apply for a new permit solely because of a change in the form of ownership of the property to condominium?" The majority has contorted this very specific jurisdictional question into a roving inquiry into whether there is generic DNR "jurisdiction to regulate" or "authority to regulate under the public trust doctrine" in order to give both the DNR and the majority some vaguely plausible jurisdictional cover. Majority op. at ¶¶ 12, 15.

¶ 95. No matter how it maneuvers, however, the majority cannot escape the obvious: if there is no statutory permit requirement for a marina condominium conversion

that involves no new placement of structures or deposits in public trust waters, then the entire administrative proceeding below was without jurisdiction, superfluous, and void.

¶ 96. It is an accepted principle of administrative law that "'an administrative agency has only those powers as are expressly conferred or necessarily implied from the statutory provisions under which it operates. . . .'" *Grafft v. DNR,* 2000 WI App 187, ¶ 6, 238 Wis. 2d 750, 756, 618 N.W.2d 897 (quoting *Brown County v. DH & SS,* 103 Wis. 2d 37, 43, 307 N.W.2d 247 (1981)); *see also Wis. Power & Light v. Public Serv. Comm'n,* 181 Wis. 2d 385, 392, 511 N.W.2d 291 (1994). Any doubts as to the existence of an implied power of an administrative agency must be resolved against the existence of authority. *Grafft,* 2000 WI App 187, ¶ 6.

¶ 97. Wisconsin Statute § 30.12 contains the legislature's grant of permitting authority to the DNR pertaining to structures and deposits on the beds of public trust waters:

> 30.12 Structures and deposits in navigable waters prohibited; exceptions; penalty. (1) GENERAL PROHIBITION. Except as provided under subs. (4) and (4m), unless a permit has been granted by the department pursuant to statute or the legislature has otherwise authorized structures or deposits in navigable waters, it is unlawful:
>
> > (a) To deposit any material or place any structure upon the bed of any navigable water where no bulkhead line has been established; or

> (b) To deposit any material or place any structure upon the bed of any navigable water beyond a lawfully established bulkhead line.
>
> (2) PERMITS TO PLACE STRUCTURES OR DEPOSITS IN NAVIGABLE WATERS; GENERALLY. The department, upon application and after proceeding in accordance with s. 30.02(3) and (4), may grant to any riparian owner a permit to build or maintain for the owner's use a structure otherwise prohibited under sub. (1), if the structure does not materially obstruct navigation or reduce the effective flood flow capacity of a stream and is not detrimental to the public interest.

Wis. Stat. § 30.12. This statute obviously contains no requirement that pre-existing, properly-permitted boat slips must be "re-permitted" upon a change of ownership. More specifically, Wis. Stat. § 30.12 does not require that an already-permitted marina undergoing conversion to the condominium form of ownership must obtain a new permit from the DNR where the conversion is a legal transaction only and involves no new placement of structures or deposits on the lake bed whatsoever.

¶ 98. The DNR permit proceeding at issue in this case was convened and conducted pursuant to Wis. Stat. § 30.12. The permit at the heart of this case was issued pursuant to Wis. Stat. § 30.12. Yet the majority refuses to engage in *any* analysis regarding the applicability of Wis. Stat. § 30.12.

¶ 99. Instead, the majority concludes that the DNR's authority to require a new permit resides somewhere in "the DNR's statutory authority to enforce the public trust

doctrine" and "the reality of the regulation process." Majority op. at ¶ 16. The majority then proceeds to discover the DNR's permitting power in Wis. Stat. § 30.03(4), together with Wis. Stat. § 30.133, which it says "is included in the public trust doctrine and forms part of the basis for the DNR's jurisdiction over ABKA's proposed condominium project." Majority op. at ¶ 13.

¶ 100. As to Wis. Stat. § 30.133, the majority's position is remarkable, since no one else – not even the Wisconsin Association of Lakes or the Lake Monona Sailing Club – relied on that statute as providing a jurisdictional basis for the DNR's requirement that ABKA get a permit for its condominium conversion. Indeed, Wis. Stat. § 30.133 says nothing at all about permits. As the majority correctly notes later in the opinion, Wis. Stat. § 30.133 was the legislative response to this court's decision in *Stoesser v. Shore Drive P'ship*, 172 Wis. 2d 660, 494 N.W.2d 204 (1993), and prohibits the transfer of riparian rights to non-riparians "by easement or by a similar conveyance." Wis. Stat. § 30.133(1); majority op. at ¶¶ 13, 60. Whatever influence this statute might have on these proceedings, it cannot seriously be considered to confer upon the DNR any jurisdiction to require or issue permits when no new structures or deposits are being placed on the lake bed.

¶ 101. The majority refers to the statute's status as being "included in the public trust doctrine," as if to suggest that the public trust doctrine itself provides a jurisdictional basis for the DNR's power to require a permit. Majority op. at ¶ 13. If that were true, then the DNR would have plenary power to require a permit anytime it got a whiff of any activity that it thought might implicate the public trust doctrine, whether or not a permit was statutorily required or authorized. This is a

radical departure from traditional administrative agency law, which, as noted above, requires a legislative grant of authority or power for administrative agency action.

¶ 102. Neither can Wis. Stat. § 30.03(4) serve as the source of the DNR's authority to require a new permit. That statute authorizes the DNR to initiate an enforcement action to enjoin "a possible violation of the statutes relating to navigable waters or a possible infringement of the public rights relating to navigable waters." Wis. Stat. § 30.03(4). It says nothing about permits.

¶ 103. Jurisdiction to initiate an enforcement action is not the same as jurisdiction to require a property owner to obtain a permit. If the DNR had grounds to initiate an enforcement action under Wis. Stat. § 30.03(4), it certainly would have done so. Had the DNR taken the majority's position that ABKA's condominium conversion constituted a violation of Wis. Stat. § 30.133, it might have initiated an enforcement action under Wis. Stat. § 30.03(4) to stop it. Had the DNR taken the court of appeals' position that ABKA's condominium conversion constituted a per se violation of the public's rights under the public trust doctrine, it might have initiated an enforcement action under Wis. Stat. § 30.03(4) to stop it. It did neither. Instead, the DNR invoked the permit provisions of Wis. Stat. § 30.12 and demanded that ABKA obtain a new permit, even though the condominium conversion involved no new placement of structures or deposits on the lake bed. The DNR had no authority to do so. We are confined to reviewing what the DNR did, not what it might have done. The majority's jurisdictional conclusions are analytically bankrupt.

¶ 104. Having badly botched the jurisdictional issue, the majority then evades the significant public trust doctrine questions surrounding both the "dockominium" concept generally and the ALJ's permit in particular by simply invalidating the condominium declaration under the condominium statutes. The majority concludes that the lock-boxes have insufficient "independent use" to fit the definition of "unit" in Wis. Stat. § 703.02(15), which defines a condominium "unit" as "a part of a condominium intended for *any type* of independent use, including one or more cubicles of air at one or more levels of space. . . . " Wis. Stat. § 703.02(15) (emphasis added).

¶ 105. The majority's interpretation of the statutory definition of "unit" ignores the definition's use of the modifier "any," which means: "in whatever degree; to some extent; at all . . . in any manner whatever." *Webster's Encyclopedic Dictionary of the English Language* (rev. ed. 1996). The majority also ignores the only reported case that specifically construes Chapter 703's definition of "unit," which interpreted the term expansively to include vacant condominium land upon which nothing had yet been constructed. *Aluminum Indus. v. Camelot Trails Condo. Corp.*, 194 Wis. 2d 574, 582-83, 535 N.W.2d 74 (Ct. App. 1995).

¶ 106. Finally, and perhaps most glaringly, the majority's interpretation of "unit" violates the explicit rule of construction contained in the condominium statutes:

> SUBSTANTIAL CONFORMITY OF CONDOMINIUM INSTRUMENTS AND BYLAWS SUFFICIENT. The provisions of any condominium instruments and bylaws filed under this chapter *shall be liberally construed to facilitate the creation and operation of the condominium.*

> So long as the condominium instruments and bylaws substantially conform with the requirements of this chapter, no variance from the requirements shall affect the condominium status of the property in question nor the title of any unit owner to his or her unit, votes and percentage interests in the common elements and in common expenses and common surpluses.

Wis. Stat. § 703.30(2) (emphasis added); *see also Rock Lake Estates Unit Owners Ass'n v. Lake Mills*, 195 Wis. 2d 348, 359, 536 N.W.2d 415 (Ct. App. 1995).

¶ 107. Despite this legislative mandate of liberal construction favoring the *creation* of condominiums, the majority nevertheless concludes that the condominium declaration "fails to create valid units under § 703.02(15) because the units defined in ABKA's declaration have no independent use." Majority op. at ¶ 55. True, the lockboxes are small, and therefore could not be put to a *significant* use. But the statute explicitly sanctions condominium units susceptible of *any* type of independent use, and the declaration must be liberally construed so as not to defeat the creation of the condominium. The majority, however, concludes that "[b]ecause there are no valid units, there is not a valid condominium conveyance of real property." *Id.*

¶ 108. Having invalidated the condominium declaration, there is really no reason for the majority to go any further, but it does. It concludes that the invalid condominium conveyance is tantamount to a conveyance of riparian rights "by easement or by a similar conveyance" contrary to Wis. Stat. § 30.133. But if the condominium conveyance is invalid under Chapter 703, how can it possibly form the basis for a violation of Wis. Stat.

§ 30.133? Stated differently, how can a legally ineffective condominium conveyance be deemed to violate Wis. Stat. § 30.133?

¶ 109. The majority has invalidated the condominium conveyance and therefore extinguished the property interests of the condominium unit owners. There is nothing left. There is no need to inquire into whether a legally defective condominium conveyance nevertheless accomplishes a conveyance of riparian rights "by easement or by a similar conveyance" in violation of Wis. Stat. § 30.133, requiring the attention of the DNR and this court.

¶ 110. The majority, of course, must reach this issue. Otherwise, its jurisdictional house of cards comes down. Having grounded the DNR's permit jurisdiction in large part on the notion that there is a potential violation of Wis. Stat. § 30.133 present here, the majority is bound to address the issue. In order to apply Wis. Stat. § 30.133, however, we must assume that a valid condominium conveyance occurred. It makes no sense to apply a statute that makes a certain sort of conveyance illegal to what the majority says is an already illegal conveyance; we have to assume an otherwise legal conveyance, and then apply the statute.

¶ 111. What the majority is really suggesting, then, is that a condominium is essentially the equivalent of an easement. This is preposterous.

¶ 112. A condominium constitutes a fee simple interest in real estate and by statute has the status of real property "for *all* purposes." Wis. Stat. § 703.04 (emphasis added) ("A unit, together with its undivided interest in the common elements, for all purposes constitutes real property."). Under no credible legal analysis can a condominium

be relegated to the status of a mere easement or like conveyance.

¶ 113. An easement is an encumbrance on the property of another. "An easement 'is a permanent interest in another's land, with a right to enjoy it fully and without obstruction.'" *Hunter v. McDonald,* 78 Wis. 2d 338, 343, 254 N.W.2d 282 (1977). The "cases have repeatedly defined an easement as 'a liberty, privilege or advantage in land, without profit, and existing distinct from the ownership of the soil.'" *Figliuzzi v. Carcajou Shooting Club of Lake Koshkonong,* 184 Wis. 2d 572, 582, 516 N.W.2d 410 (1994); *see also Stoesser,* 172 Wis. 2d at 667.

¶ 114. Noting that the condominium owners collectively own the land and improvements at the Abbey Harbor Marina, and that "[u]nder Wisconsin law it is clear that a person 'can not maintain an easement over his own land,'" the ALJ concluded that the condominium declaration "is not the conveyance by 'easement or similar conveyance' of riparian rights within the meaning of sec. 30.133, Stats." Although the ALJ denominated this as a finding of fact, I read it as a conclusion of law.

¶ 115. An agency's conclusions of law are reviewed by reference to one of three levels of deference: "great weight," "due weight," or "de novo." *RURAL v. PSC,* 2000 WI 129, ¶ 21. "*De novo* review is appropriate where there is no evidence that the agency used any special knowledge or expertise, the issue is clearly one of first impression, or the agency's position on an issue has been inconsistent." *Id.* at ¶ 22. No one has suggested that the agency lacked expertise or was inconsistent in its positions, and the issue of what constitutes an easement or like conveyance can hardly be characterized as one of first impression.

¶ 116. Accordingly, at least due weight, or possibly great weight deference is owed to the ALJ's conclusion that there is no violation of Wis. Stat. § 30.133 here. It is very difficult to flunk either of these standards of review. Due weight deference means that any reasonable legal interpretation by an agency will be upheld, unless the court finds a *more* reasonable interpretation. *Id.* at ¶ 24 n. 12. That is, the agency's legal interpretation will be upheld even if there is a different, equally reasonable interpretation – in other words, a tie goes to the agency. Great weight deference means what it says: the agency almost always wins. Under either of these standards, the ALJ's determination that Wis. Stat. § 30.133 was not violated must be upheld. Any suggestion that a condominium is akin to an easement is far from reasonable.

¶ 117. Apparently the majority is not bothered one bit by the gaping holes in and circularity of its analysis. Worse, by adopting this sua sponte, terribly misguided approach, the majority has completely failed to address the critically important administrative and water law issues that were actually presented in this case, and therefore has left them for another day.[1] There are a number of other "dockominium" marinas around the state. Their legal status – called into question by the court of

[1] Both the ALJ's resolution of this case and the court of appeals' per se invalidation of the "dockominium" concept have significant implications for the public trust doctrine in this state, and also potentially for takings jurisprudence. *See ABKA, Ltd. P'ship v. DNR,* Dec. No. 3-SE-95-0080 (DNR 1996); *ABKA, Ltd. P'ship v. DNR,* 2001 WI App 223, 247 Wis. 2d 793, 635 N.W.2d 168; *see also, R.W. Docks & Slips v. State,* 2001 WI 73, 244 Wis. 2d 497, 628 N.W.2d 781, *cert. denied,* 122 S.Ct. 617 (2001).

appeals' opinion – remains in substantial doubt. The majority has not only trampled on the private property rights of the individual condominium owners in this case (not to mention ABKA's), it has done significant damage to the law of condominiums, administrative agency jurisdiction, and the public trust doctrine. I dissent.

¶ 118. I am authorized to state that Justice DAVID T. PROSSER joins this dissenting opinion.

[LOGO]

OFFICE OF THE CLERK

Supreme Court of Wisconsin

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WI 53701-1688

TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
Web Site: www.courts.state.wi.us

December 17, 2001

To:

Hon. Michael S. Gibbs
Walworth County Circuit Court
P.O. Box 1001
Elkhorn, WI 53121-1001

Sheila Reiff
Walworth County Clerk of Courts
P.O. Box 1001
Elkhorn, WI 53121-1001

Waltraud A. Arts
Quarles & Brady, LLP
P.O. Box 2113
Madison, WI 53701-2113

John S. Greene
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Lawrence R. Heath
Corporation Counsel
P.O. Box 400
Rhinelander, WI 54501-0400

Peter B. King
Attorney at Law
P.O. Box 374
Fontana, WI 53125-0374

(Additional Parties on Page 3)

You are hereby notified that the Court has entered the following order:

No. 99-2306 *ABKA Limited v. Wis. DNR* L.C.#s 96CV00436, 96CV00438, 96CV00602, 96CV00605, 96CV00607

Three petitions for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of (1) petitioner-appellant-joint petitioner, ABKA Limited Partnership, and petitioner-co-appellant-joint petitioner. The Abbey Harbor Condominium Assn. (collectively ABKA); (2) petitioner-appellant-petitioner, Wisconsin Realtors Assn., Inc. (WRA); and (3) respondent-respondent-petitioner, Wisconsin Department of Natural Resources (DNR), and considered by this court;

IT IS ORDERED that all the petitions for review are granted but review is limited to the following issues:

1. Does a person who files a permit application thereby waive all objections to the permitting agency's jurisdiction – even where the applicant and the agency have expressly agreed that a permit proceeding is the best way to resolve a jurisdictional dispute and the applicant could challenge the agency's jurisdiction in that proceeding?

2. Was DNR obliged to deny, as inconsistent with the public trust doctrine, an application for a permit authorizing the maintenance of boatslips by the owners of "condominiums," where under the condominium declaration each unit owner is assigned, as a "limited common element," the right to use a specific slip, "subject to the rights of the members of the public and the State of Wisconsin under Wisconsin law and subject to permits issued by the State of Wisconsin?"

3. Has the legislature given the DNR authority in Wis. Stat. § 30.12 to require the owner of a permitted marina to apply for a new permit solely because of a change in the form of ownership of the property to condominium?

IT IS FURTHER ORDERED that pursuant to Wis. Stat. § (Rule) 809.62 within 30 days after the date of this order the DNR shall file its brief addressing the three issues listed above and that within 20 days thereafter, ABKA and WRA shall file their briefs addressing the three issues listed above and responding to the DNR's brief; that within 10 days thereafter, the DNR shall file its brief, if any, replying to ABKA and WRA's briefs.

IT IS FURTHER ORDERED that within 20 days after ABKA and WRA file their opening briefs, the petitioner-appellant, Wisconsin Association of Lakes, Inc. (WAL) may file a brief, or a statement declining to file a brief, responding to the opening briefs filed by DNR, ABKA and WRA and that within 10 days thereafter, DNR, ABKA and WRA may each file briefs replying to WAL's responsive brief.

IT IS FURTHER ORDERED that in any brief filed in this court the parties shall not incorporate by reference any portion of their court of appeals' brief or petition for review or response; instead, any material in these documents upon which there is reliance should be restated in the brief filed in this court; and

IT IS FURTHER ORDERED that the first brief filed in this court must contain, as part of the appendix, a copy of the decision of the court of appeals in this case; and

IT IS FURTHER ORDERED that within 30 days after the date of this order, each party must provide the clerk of

this court with 10 copies of the brief previously filed on behalf of that party in the court of appeals; and

IT IS FURTHER ORDERED that the allowance of costs, if any, in connection with the granting of the petition will abide the decision of this court on review.

Wilcox, J., did not participate.

Cornelia G. Clark
Clerk of Supreme Court

Additional Parties:

William P. O'Connor
Mary Beth Peranteau
Wheeler, Van Sickle & Anderson
25 West Main Street, Suite 801
Madison, WI 53703-3398

Winston A. Ostrow
Donald L. Romundson
Godfrey & Kahn, S.C.
P.O. Box 13067
Green Bay, WI 54307-3067

Thomas L. Shriner, Jr.
G. Michael Halfenger
Foley & Lardner
777 E. Wisconsin Avenue
Milwaukee, WI 53202-5367

ABKA Ltd. Partnership v. DNR, 247 Wis. 2d 793

ABKA LIMITED PARTNERSHIP, an Illinois limited partnership, Petitioner-Appellant,

THE ABBEY HARBOR CONDOMINIUM ASSOCIATION, LTD., a Wisconsin nonprofit corporation, Petitioner-Co-Appellant,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES, Geneva Lake Conservancy, Inc., and Oneida County, Respondents-Respondents.

WISCONSIN REALTORS ASSOCIATION, INC., Petitioner-Appellant,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES, Respondent-Respondent.

ABKA LIMITED PARTNERSHIP, an Illinois limited partnership, Petitioner-Appellant,

THE ABBEY HARBOR CONDOMINIUM ASSOCIATION, LTD., a Wisconsin nonprofit corporation, Petitioner-Co-Appellant,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES, Respondent-Respondent.

WISCONSIN ASSOCIATION OF LAKES, INC.,
Petitioner-Appellant,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
Respondent-Respondent.

WISCONSIN REALTORS ASSOCIATION, Inc.,
Petitioner-Appellant,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
Respondent-Respondent.

Court of Appeals

No. 99-2306. Oral argument May 1, 2001. –
Decided August 22, 2001

2001 WI App 223

(Also reported in 635 N.W.2d 168.)

BROWN, J., dissents.

APPEAL from an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Reversed.*

On behalf of the petitioner-appellant ABKA Limited Partnership and the petitioner-co-appellant The Abbey Harbor Condominium Association, Ltd., there were joint briefs by *Anthony S. Earl, Waltraud A. Arts* and *Brian W. Blanchard* of *Quarles & Brady, LLP* of Madison; *Alan Marcuvitz* of *Weiss, Berzowski, Brady & Donahue, LLP* of Milwaukee; *Lisle W. Blackbourn* of *Godfrey, Neshek, Worth, Leibsle & Conover, S.C.* of Elkhorn; and *Thomas L.*

Shriner, Jr. of *Foley & Lardner* of Milwaukee. There were oral arguments by *Thomas L. Shriner, Jr.*

On behalf of the petitioner-appellant Wisconsin Realtors Association, Inc., there were briefs by *Winston A. Ostrow* and *Donald L. Romundson* of *Godfrey & Kahn, S.C.* of Green Bay. There were oral arguments by *Donald L. Romundson.*

On behalf of the petitioner-appellant Wisconsin Association of Lakes, Inc., there were briefs by *William P. O'Connor* and *Mary Beth Peranteau* of *Wheeler, Van Sickle & Anderson, S.C.* of Madison. There were oral arguments by *William P. O'Connor.*

On behalf of the respondent-respondent Wisconsin Department of Natural Resources, there was a brief by *John S. Greene,* Assistant Attorney General, and *James E. Doyle,* Attorney General. There were oral arguments by *John S. Greene.*

On behalf of the respondent-respondent Geneva Lake Conservancy, Inc., there was a brief and oral arguments by *Peter B. King* of *Peter B. King, Attorney at Law, S.C.* of Fontana.

On behalf of the respondent-respondent Oneida County, there were briefs and oral arguments by *Lawrence R. Heath,* Corporation Counsel.

Before Nettesheim, P.J., and Brown and Snyder, JJ.

¶ 1. SNYDER, J. This case is the result of five separate cases consolidated before the circuit court. ABKA Limited Partnership (ABKA) and The Abbey Harbor Condominium Association, Ltd. (the Association) appeal from a circuit court order denying their joint petition for

review of an administrative law judge's (ALJ) decision regarding their Wis. Stat. ch. 30 (1999-2000)[1] permit application to the Wisconsin Department of Natural Resources (DNR). ABKA owned a public marina and sought to convert ownership of all 407 boat slips to a condominium-style ownership called "dockominiums." The ALJ expressly limited the number of boat slips that ABKA can convert to dockominiums. ABKA and the Association challenge the DNR's jurisdiction to require a new permit and to limit the number of dockominiums in the Marina. In addition, ABKA and the Association argue that the ALJ's decision to limit the number of dockominiums is arbitrary and unsupported by record evidence.

¶ 2. The Wisconsin Realtors Association, Inc. (WRA) also appeals the circuit court's order, arguing that the DNR's guidances, used by the DNR to arrive at the appropriate number of dockominiums, are illegal attempts to circumvent the rule-making requirements of Wis. Stat. ch. 227, that Wis. Admin. Code § NR 326.04(8) is invalid, that the change in ownership to condominium-style ownership is allowed, and that the DNR did not have the authority to require a new Wis. Stat. § 30.12 permit.

¶ 3. In addition, the Wisconsin Association of Lakes, Inc. (WAL) appeals the circuit court's order. In contrast to ABKA and WRA, WAL argues that ABKA's dockominium development violates the public trust doctrine by purporting to convey a perpetual exclusive right to a portion of

[1] All statutory references are to the 1999-2000 version unless otherwise noted.

Lake Geneva, exceeds reasonable riparian rights, and violates the provisions of Wis. Stat. § 30.133.

¶ 4. We agree with WAL that the dockominium development proposed by ABKA and the Association violates the public trust doctrine.

FACTS

¶ 5. In 1994, ABKA was the owner of the Abbey at Fontana at Lake Geneva; the Abbey Harbor (the Harbor) was created by the dredging of Potawatomi Creek pursuant to a permit issued in July 1962 by the Wisconsin Public Service Commission. When issuing this permit, the PSC also authorized the construction of the first 200 boat slips of what would eventually become the 407 slip Marina. Additional permits were later issued, the most recent issued in 1987 for the construction of additional piers and slips in the Harbor.

¶ 6. The Harbor consists of a man-made basin with 407 boat slips, a swimming pool, a parking area, and a Harbor House. The Marina's 407 boat slips were rented to boat owners on an annual basis with the option to renew. In late 1994, ABKA, the private owner of the Marina, decided to convert the Marina to a condominium form of ownership and began preparation of a condominium declaration. ABKA's proposal did not change the number, size or configuration of any structure in the Marina, but simply changed the ownership to condominium style. During these preparations, the DNR contacted ABKA and asked to review the language of the proposed condominium declaration.

¶ 7. After reviewing the language of the proposed condominium declaration, the DNR insisted upon language changes in the declaration. The DNR approved the revised language changes of the Abbey Harbor Condominium Declaration (Declaration), which was filed on February 28, 1995.

¶ 8. Under the revised terms of the Declaration, each unit is separately owned property held in fee simple title by the unit owner. A dockominium unit is defined as a cubicle of space in a lock-box located within a building known as the Harbor House at the Marina. Each unit/lock-box has a number which corresponds to an existing boat slip at the Marina. Each unit owner has the right to use the space beside the pier or piers corresponding to the unit number.

¶ 9. In addition to the independent ownership of each unit, the unit owners own, as tenants in common with each other, all of the common elements of the condominium, including all of the real estate, the Harbor House, the parking lots, all docks and piers, and the swimming pool. A unit owner is entitled to freely sell, lease, sublease, rent or license the unit, and is required to keep the structures adjacent to the unit in good repair.

¶ 10. Under the terms of the Declaration, each unit owner is required to be a member of the Association, which is responsible for the maintenance, repair and replacement of all common elements, dredging the Harbor and landscaping. The Declaration also endows the Association with the authority to enforce compliance with its terms and to assess unit owners for the costs associated with the operation, maintenance and repair of the Marina.

¶ 11. After the language of the Declaration was changed, the DNR maintained that ABKA had to apply for a new Wis. Stat. § 30.12 permit to convert the Marina to condominium ownership. The DNR maintained that under § 30.12, a certain number of boat slips needed to be withheld from sale and set aside for seasonal rental to the public. While ABKA challenged the DNR's authority to require both a new permit and a certain number of set-asides, on March 13, 1995, ABKA filed an application for a new § 30.12 permit, requesting authorization for the conveyance of 407 boat slips to private owners under a condominium form of ownership and reserving the right to challenge the DNR's jurisdiction in this matter. The Association was subsequently made a co-applicant in the proceedings. On April 5, 1995, Geneva Lake Conservancy, Inc. (Geneva Lake) objected to the permit application, which was then referred to the Division of Hearings and Appeals for a contested case hearing. Pending a hearing on the permit application, the DNR and ABKA reached an agreement that ABKA could file the Declaration; that the current structures at the Marina were validly permitted; that a contested case hearing would determine how many boat slips, if any, needed to be set aside; and that ABKA could begin selling up to 282 units, setting aside at least 125 units until a hearing decision was rendered.

¶ 12. On November 13-17 and December 18, 1995, a contested case hearing was held before an ALJ regarding ABKA and the Association's permit application. Geneva Lake, WRA, WAL and Oneida County (Oneida) fully participated in the contested case hearing as intervening parties; WRA was in support of the condominium project, while Geneva Lake, WAL and Oneida were opposed. On July 29, 1996, the ALJ issued his decision, finding that the

DNR did have jurisdiction to require a new Wis. Stat. § 30.12 permit, and that 287 of the 407 slips at the Marina must be set aside for seasonal rental.

¶ 13. On August 23, 1996, ABKA filed a petition for judicial review of the ALJ's decision in both Walworth county and Dane county. WRA also filed a petition for judicial review in Walworth and Dane counties. WAL then filed a petition for review of the ALJ's decision in Dane county. By stipulation, on October 14, 1996, the Walworth County Circuit Court entered an order transferring the Dane county cases to Walworth county and consolidating all of the above actions.[2]

¶ 14. After briefing and oral argument, on June 4, 1999, the circuit court issued a decision affirming the ALJ's decision and entered a final order denying the petitions for review on June 24, 1999. ABKA, the Association, WRA and WAL filed notices of appeal. Geneva Lake and Oneida filed separate petitions to intervene. On October 19, 1999, ABKA filed a motion, with all parties agreeing to said motion, to consolidate the above appeals. We determined that consolidation of the above actions was unnecessary because the cases were consolidated in the circuit court and were resolved in a single circuit court order; thus, the notices of appeal of the various appellants gave rise to a single appeal proceeding. Furthermore, we

[2] In addition, in October 1996, DFS Development, Inc., Charles E. Eklund and Chicago Title Insurance Company filed in the circuit court a proposed petition for judicial review by applicants for intervention as party petitioners. This motion to intervene was denied by the circuit court on December 12, 1996; we ultimately affirmed this denial on December 10, 1997.

denied Oneida's and Geneva Lake's petitions to intervene. However, we held that because they were parties in the circuit court, and were adverse to some or all of the appellants, they were respondents who could defend the circuit court's order against challenges made to it by the appellants.

¶ 15. On September 20, 2000, we certified this matter to the Wisconsin Supreme Court, as the matters at issue are ones of first impression and represent important public policy questions regarding riparian rights and the public trust doctrine. We certified as to one issue: Is a dockominium development, based upon condominium real estate law, that limits public access to navigable waters in favor of private riparian ownership a violation of the Wisconsin public trust doctrine and Wis. Stat. ch. 30? After our request for certification, ABKA filed a motion for leave to file a supplemental brief. The Wisconsin Supreme Court accepted certification on October 19, 2000.

¶ 16. On November 13, 2000, ABKA and the Association filed a motion to clarify the scope of the issues certified. Following all parties' numerous and varied responses to ABKA and the Association's motion, the Wisconsin Supreme Court rescinded and withdrew its order accepting certification, and this matter was returned to us.

STANDARD OF REVIEW

¶ 17. This case involves an appeal from a circuit court order affirming the decision of an administrative agency. In an appeal from such an order, we review the decision of the agency, not the circuit court. *Sea View Estates Beach Club, Inc. v. DNR*, 223 Wis.2d 138, 145, 588 N.W.2d 667 (Ct. App. 1998). Review of an agency's decision

is confined to the record. *Sterlingworth Condo. Ass'n, Inc. v. DNR,* 205 Wis.2d 710, 720, 556 N.W.2d 791 (Ct. App. 1996).

¶ 18. A different standard of review for agency decisions is applied for questions of law and questions of fact. *Sea View Estates,* 223 Wis.2d at 148. If presented with a question of fact, we employ the "substantial evidence" standard. *Id.* Substantial evidence is such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. *Id.* If the issue presents a question of law, we must set aside or modify the agency action if we find that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or we shall remand the case to the agency for further action under a correct interpretation of the provision of law. *Id.* To this end, we apply one of three levels of deference to the conclusion of the agency: "great weight," "due weight" or "de novo." *Id.*

¶ 19. An agency's interpretation or application of a statute may be accorded great weight deference, due weight deference or de novo review, depending on the circumstances. *UFE Inc. v. LIRC,* 201 Wis.2d 274, 284, 548 N.W.2d 57 (1996). We accord great weight deference only when all four of the following requirements are met: the agency was charged by the legislature with the duty of administering the statute; the interpretation of the agency is one of long standing; the agency employed its expertise or specialized knowledge in forming the interpretation; and the agency's interpretation will provide uniformity and consistency in the application of the statute. *Id.* Under the great weight standard, we will uphold an agency's reasonable interpretation that is not contrary to the clear

meaning of the statute, even if we determine that an alternative interpretation is more reasonable. *Id.* at 287.

¶ 20. We will accord due weight deference when "the agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position to make judgments regarding the interpretation of the statute than a court." *Id.* at 286. The deference allowed an administrative agency under due weight review is accorded largely because the legislature has charged the agency with the enforcement of the statute in question. *Id.* Under this standard, we will not overturn a reasonable agency decision that furthers the purpose of the statute unless we determine that there is a more reasonable interpretation under the applicable facts than that made by the agency. *Id.* at 286-87. Finally, we will employ de novo review when the legal conclusion reached by the agency is one of first impression or when the agency's position on the statute has been so inconsistent as to provide no real guidance. *Id.* at 285.

¶ 21. While Oneida argues that the DNR's decision should be accorded great weight, ABKA, the Association, WRA, WAL, the DNR and Geneva Lake all maintain that the agency's decision should be accorded no weight and should be reviewed de novo. The agency's decision does not meet the "great weight" standard; although the legislature has charged the DNR with the duty of enforcing environmental laws, including the regulation of piers in navigable water, *Sea View Estates,* 223 Wis.2d at 149, the issue of a public marina's conversion to private property and condominium ownership is an issue of first impression. This also precludes "due weight" deference, and thus de novo review is required.

PRINCIPLES OF PROPERTY OWNERSHIP, REAL AND RIPARIAN

¶ 22. The instant issue involves the conversion of real riparian property, a marina privately owned by a limited partnership, to another form of private property ownership. Identification and definition of the pertinent legal terms and doctrines is necessary for a thorough understanding of the issues.

¶ 23. In 1995, ABKA privately owned the 407-slip Marina. A "marina" is defined as "[a] boat basin that has docks, moorings, supplies, and other facilities for small boats." AMERICAN HERITAGE DICTIONARY 766 (2d College ed. 1982). The ownership of land has often been referred to as a "bundle of rights." *State ex rel. Wis. Edison Corp. v. Robertson,* 99 Wis.2d 561, 569. (Ct. App. 1980). This "bundle of rights" real property theory asserts that the owner has the right to enter it, use it, sell it, lease it, or give it away, as he or she so chooses. *Id.* at 569 n. 11. These rights are guaranteed by law but are also subject to certain governmental and private restrictions. *Id.*

¶ 24. The Marina, because it borders Lake Geneva, is also riparian property, and thus ABKA is a riparian owner. Riparian owners are those who have title to the ownership of land on the bank of a body of water. *Ellingsworth v. Swiggum,* 195 Wis.2d 142, 148, 536 N.W.2d 112 (Ct. App. 1995). A riparian owner is accorded certain rights based upon title to the ownership of shorefront property. *Sea View Estates,* 223 Wis.2d at 157. These rights are well defined and include the right to use the shoreline and have access to the waters, the right to reasonable use of the waters for domestic, agricultural and recreational purposes, and the right to construct a pier or

similar structure in aid of navigation. *Id.* A riparian owner is entitled to exclusive possession to the extent necessary to reach navigable water and to have reasonable access for bathing and swimming. *Id.*

¶ 25. In February 1995, ABKA filed a condominium Declaration to convert and sell the Marina boat slips to private owners as "dockominium" units; this dockominium scheme is, in essence, a condominium type of ownership of the Marina. Dockominium projects are typically premised on condominium law because a dockominium is similar to a condominium in that both involve the division and co-ownership of an asset previously owned by a single entity. Karin J. Wagner, *Geneva Lake Dockominiums: An Exercise of Riparian Rights in Violation of the Public Trust Doctrine,* 4 WIS. ENVTL. L.J. 243, 245 (Summer 1997).

¶ 26. "Condominium" is defined as "property subject to a condominium declaration established under this chapter." Wis. Stat. § 703.02(4). A "declaration" is defined as "the instrument by which a property becomes subject to this chapter, and that declaration as amended from time to time," § 703.02(8), and must contain all of the elements set forth at Wis. Stat. § 703.09. A condominium "unit" is defined as

> a part of a condominium intended for any type of independent use, including one or more cubicles of air at one or more levels of space or one or more rooms or enclosed spaces located on one or more floors, or parts thereof, in a building. A unit may include 2 or more noncontiguous areas.

Sec. 703.02(15). The "common elements" of a condominium are defined as "all of a condominium except its units," § 703.02(2), while the "limited common elements" are

defined as "those common elements identified in a declaration or on a condominium plat as reserved for the exclusive use of one or more but less than all of the unit owners." Sec. 703.02(10).

¶ 27. No similar statutory definition for "dockominium" exists. While a dockominium can be considered, from the mere origin of its name, a condominium-style marina, a dockominium has been more precisely defined as a "dockside community of privately owned boats moored in slips that are purchased for year-round living. . . . A slip in such a community." AMERICAN HERITAGE DICTIONARY (4th ed. 2000) at http://www.bartleby.com/61/53/D0315300.html. A "slip" is defined as a "docking place for a ship between two piers." *Id.* at http://www.bartleby.com/61/54/S0475400.html.

¶ 28. Here, under the Declaration, a dockominium unit consists of

> that separate area of the condominium intended for independent, private use, comprised of a cubicle of space defined by a "Lock Box" located within the Harbor House. . . . Each unit shall include as an appurtenance,[3] standard riparian rights of owners of waterfront real estate under Wisconsin Law, and the use of an assigned boat slip corresponding to the unit designation as a part of the common elements. . . .

[3] An "appurtenance" is defined as "[s]omething that belongs or is attached to something else." BLACK's LAW DICTIONARY 98 (7th ed. 1999).

The Declaration also states that the common elements do not include the above-described individual units, but "[e]ach unit owner, as a limited common element appurtenant exclusively to his unit, shall have riparian rights to use of the space beside the pier or piers corresponding to his unit number . . . for use as a boat slip." Each unit owner has a fee simple interest in his or her dockominium unit, and an undivided interest in the common elements and facilities and limited common elements as a tenant in common with all other unit owners. A fee simple interest means "[a]n interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs. . . . " BLACK'S LAW DICTIONARY 630 (7th ed. 1999). "Tenancy in common" is defined as "[a] tenancy by two or more persons, in equal or unequal undivided shares, each person having an equal right to possess the whole property but no right of survivorship." *Id.* at 1478.

¶ 29. While riparian owners such as ABKA have certain well-established rights that are incidents of their ownership of property adjacent to the water, under the public trust doctrine, these rights are subject to the public's right to use navigable waters. *State v. Bleck*, 114 Wis.2d 454, 469, 338 N.W.2d 492 (1983). The public trust doctrine has its roots in article IX, section 1 of the Wisconsin Constitution, under which the state holds the beds of navigable waters in trust for public use.[4] *Borsellino v. DNR*, 232 Wis.2d 430, 443, 606 N.W.2d 255 (Ct. App.

[4] In fact, the public trust doctrine precedes our state constitution. *Borsellino v. DNR*, 232 Wis.2d 430, 443 n. 6, 606 N.W.2d 255 (Ct. App. 1999), citing to article IV of the Northwest Ordinance of 1787.

1999). The regulation and enforcement of this public trust rests with the legislature and the DNR. *Id.*

¶ 30. Although the public trust doctrine was originally designed to protect commercial navigation, it has been expanded to protect the public's use of navigable waters for purely recreational and nonmonetary purposes. *Bleck,* 114 Wis.2d at 465. Public policy factors signifying the public interest include the wish to preserve the natural beauty of our navigable waters, to obtain the fullest public use of these waters, including but not limited to navigation, and to provide for the convenience of riparian owners. *Sea View Estates,* 223 Wis.2d at 159. Such public interest concerns also include maintaining the safe and healthful condition of the water, protecting spawning grounds and aquatic life, controlling the placement of structures and land uses, preserving shore cover and natural beauty, and promoting the general attractiveness and character of the community environment. *Id.* at 160.

¶ 31. The common law also requires reasonable use by riparian owners. *Sterlingworth,* 205 Wis.2d at 731. "[E]very . . . right which a riparian owner acquires, as such, to the waters . . . by his land, is restricted always to that which is a . . . reasonable use, and these terms are to be measured and determined by the extent and capacity of the [lake], the uses to which it has been put, and the rights that other riparian owners on the same [lake] also have." *Id.* (citation omitted).

¶ 32. The legislature has charged the DNR with the duty of enforcing environmental laws, including the regulation of piers in navigable waters pursuant to Wis. Stat. §§ 30.12 and 30.13. Both § 30.12 and Wis. Stat. ch. 30 generally codify a number of common law doctrines

regarding the ownership of the beds of navigable waters. *State v. Trudeau,* 139 Wis.2d 91, 101, 408 N.W.2d 337 (1987). Section 30.12 is a codification of the common law restriction against encroachments on publicly held lake beds, *Trudeau,* 139 Wis.2d at 102, and its function is to regulate the placement of fill or structures on the beds of navigable waters, but not to regulate the use and enjoyment of those waters. *Bleck,* 114 Wis.2d at 467. Section 30.12 is a rational way of accommodating both the public trust doctrine and the reasonable use doctrine, as it "recognizes the tradition of certain rights unique to riparian owners, yet ensures that riparians will not be able to place structures on the beds of navigable waters if they are detrimental to the paramount public interest." *Bleck,* 114 Wis.2d at 469-70. A § 30.12 permit will not be authorized if the structure proposed by the riparian owner materially obstructs navigation or if the structure infringes upon the public interest. *Bleck,* 114 Wis.2d at 469.

¶ 33. The Wisconsin Supreme Court has stated that

> [t]he title to the beds of all lakes and ponds, and of rivers navigable in fact as well, *up to the* line of ordinary high-water mark, within the boundaries of the state, became vested in it at the instant of its admission into the Union, in trust to hold the same so as to preserve to the people forever the enjoyment of the waters of such lakes, ponds, and rivers, to the same extent that the public are entitled to enjoy tidal waters at the common law.

Trudeau, 139 Wis.2d at 101 (citation omitted).

DISCUSSION

Jurisdiction of the DNR

¶ 34. ABKA[5] first argues that the DNR lacked jurisdiction to require it and the Association to apply for a new Wis. Stat. § 30.12 permit. Specifically, ABKA argues that § 30.12 does not provide a valid basis for the DNR to review its existing permit.

¶ 35. ABKA and the DNR reached an agreement wherein ABKA agreed to apply for a new permit, but reserved the right to contest the DNR's jurisdiction. However, as both this agreement and the ALJ noted, we are not bound by this understanding. In addition, while the ALJ provided a thorough and well-reasoned analysis of the reach of Wis. Stat. § 30.12 and the DNR's authority, we hold that ABKA waived this argument by applying for the new permit in the first place.

¶ 36. The application filed by ABKA specifically states that the application is filed pursuant to Wis. Stat. ch. 30. While ABKA asserts in the application that "the DNR has no jurisdiction to require a review or modification of" the permit, and that ABKA was not "waiving or limiting its rights to contest" the DNR's jurisdiction, by applying for the permit it willingly placed itself under the DNR's jurisdiction and the reach of ch. 30. ABKA may have filed the application under protest, but the DNR did not force it to file the application. ABKA could have refused to file the application and risked an enforcement

[5] ABKA submitted briefs and provided oral arguments on both its and the Association's behalf.

proceeding or the imposition of fines and penalties, wherein it could have challenged the DNR's authority. *See Sterlingworth,* 205 Wis.2d at 726-27. Furthermore, ABKA could have filed a declaratory judgment action in circuit court under Wis. Stat. § 227.40, asking a circuit court to determine its rights and obligations under Wis. Stat. § 30.12. Instead, it chose to file a ch. 30 permit application. As both the agreement and the ALJ noted, any reliance on the agreement was the result of a calculated business gamble by ABKA, done at ABKA's own risk. As applicants, ABKA and the Association placed themselves under the DNR's jurisdiction, thereby foreclosing the argument that the DNR had no jurisdiction over this project.

Public Trust Doctrine

¶ 37. WAL argues that ABKA's dockominium development violates the public trust doctrine by attempting to convey a perpetual exclusive right to a portion of Lake Geneva.

¶ 38. We pause to commend the ALJ for the careful, extensive and professional analysis that resulted in the agency decision under review. As the ALJ noted in his comprehensive and in-depth analysis, this is a matter of first impression in Wisconsin and the law is silent on the issue of whether the dockominium form of ownership is permissible under the public trust doctrine. It is clear that the dockominium concept represents a confrontation between a private claim in boat slip space and public interests in the water. Mark Cheung, *Dockominiums: An Expansion of Riparian Rights that Violates the Public Trust Doctrine,* 16 B.C. ENVTL. AFF. L. REV. 821, 825 (Summer 1989).

¶ 39. The United States Supreme Court's seminal decision on the public trust doctrine held that the state is directed to act as trustee of the waters within its borders and to protect the public's right to use the waters. *Illinois Cent. R.R. Co. v. Illinois,* 146 U.S. 387, 435 (1892). The public trust doctrine is premised on the idea that private ownership of public resources is improper and provides the public with a right to the benefit of certain public resources. Cheung, *supra,* at 830-31. This right supplants any private interests and imposes strict responsibilities upon the government as trustee of these public resources. *Id.* The government cannot relinquish its trust duties associated with any public property. *Id.* at 831.

¶ 40. Regulation of private riparian uses is essential if the state is to fulfill its role of protecting state waters. Wagner, *supra,* at 247. When conflicts occur over the use of the waters of the state, riparian rights must always surrender to the public interest. *Id.* at 248. Wisconsin has repeatedly acknowledged its obligation to safeguard the state's navigable water resources for the use, enjoyment and benefit of the public. *Id.* at 247.

¶ 41. Here, section 5 of the Declaration provides definitions and a description of the units; a dockominium unit is

> that separate area of the condominium intended for independent, private use, comprised of a cubicle of space defined by a "Lock Box" located within the Harbor House as shown in the Condominium Plat. . . . Each unit shall include as an appurtenance, standard riparian rights of owners of waterfront real estate under Wisconsin Law, and the use of an assigned boat slip corresponding to the unit designation as a part of the common

elements of **THE ABBEY HARBOR CONDOMINIUM.**

According to the Declaration, the common elements and facilities consist of the real property, and real property interests, improvements and appurtenances described in this Declaration, except the above-described individual units; the common elements and facilities

> shall include, without limitation, the land and real property interests described . . . herein including the buildings and improvements located thereon, the marina shoreline, sea wall and sidewalk along said shoreline . . . all docks, boardwalks, piers and pilings contained within the marina, all as shown on the Condominium Plat . . . the Harbor House, outdoor swimming pool, boat launching ramp, sidewalks, driveways and walkways, utility services, utility lines and conduits including those leading up to the utility pedestal boxes serving the respective boat slips, parking areas within the condominium Property, and those improvements, structures and facilities shown on the Condominium Plat as well as certain "Dock Boxes" located on the condominium Property, but not shown on the Condominium Plat, and any and all other parts or elements of the condominium Property as described in this Declaration and additions thereto in the future made by the unit owners or the Association of Unit Owners (hereinafter described).

The limited common elements include the boat slips:

> Each unit owner, as a limited common element appurtenant exclusively to his unit, shall have riparian rights to use of the space beside the pier or piers corresponding to his unit number as shown in the Condominium Plat, for use as a

> boat slip.... The placement of riparian structures in, and the use of, the waters of the marina as a part of **THE ABBEY HARBOR CONDOMINIUM** is subject to the rights of the members of the public and the State of Wisconsin under Wisconsin law and subject to permits issued by the State of Wisconsin.

¶ 42. Each unit owner owns a fee simple interest in his or her condominium unit and an undivided interest in the common elements and facilities and limited common elements as a tenant in common with all other unit owners. Unit owners can sell, lease, sublease, rent, license or otherwise contract for the usage of their respective boat slip, without restriction, subject to state permits, on a long-term or short-term basis, in their sole discretion. Individual unit owners are required to maintain or provide all necessary insurance for their unit and its appurtenance.

¶ 43. Technically, the conveyance of the dockominium unit as defined by the Declaration fulfills the requirements of Wisconsin's condominium law because the unit is intended for independent use and is an enclosed space located within a building, a lock-box in the Harbor House. Wagner, *supra,* at 251. However, unlike most condominium units, the lock-box itself has no inherent value; rather, the appurtenant rights attached to the conveyance are the valuable commodity. *Id.* We agree with the ALJ that, to some degree, "the dockominium concept involves a legal fiction: that ABKA is selling the lock-box condominium units, rather than the pier slips."

¶ 44. By definition, a "dockominium" is a "dockside community of privately owned boats moored in slips that are purchased for year-round living.... A slip in such a

community." AMERICAN HERITAGE DICTIONARY (4th ed. 2000) at http://www.bartleby.com/61/53/D0315300.html. Here, while a dockominium unit is labeled a lock-box, appurtenant to the lock-box is the exclusive use of an assigned boat slip as part of the common elements. As a common element, the boat slip is conveyed to the unit owners and the Association as tenants in common. But a boat "slip" is, by definition, a "docking place for a ship between two piers." *Id.* at http://www.bartleby.com/61/54/S0475400. html. In other words, *a boat slip is the water and the lake bed under the water.* Thus, ABKA is attempting to convey a portion of the waters of Lake Geneva to the unit owners as tenants in common. The ALJ's decision acknowledges that under the Declaration, the "pier slip is [the individual owner's] and cannot be considered to provide a public benefit." The public trust doctrine should not be manipulated to allow a conveyance of interest in the water as tenants in common. Cheung, *supra,* at 852.

¶ 45. An examination of existing literature on dockominiums confirms this conclusion. A dockominium does not adversely impact water quality, quantity or flow, but despite the dockominium's creative manipulation of riparian rights, it does obstruct the public's complete access to the waterways and creates a claim of private ownership upon water owned by the public. *Id.* at 825. In fact, the dockominium concept is founded on the idea that individuals may own exclusive control of the water within a boat slip space. *Id.* at 822.

¶ 46. Dockominium purchasers become riparian owners of the individual parcels of riparian rights and understandably expect that no other boater, or even a swimmer, can occupy the slip space. *Id.* at 844. This expectation suggests that the dockominium owner owns

the water within the slip space. *Id.* As the ALJ noted, the use of the waters of Abbey Harbor, including the waters in the boat slips, is legally open to members of the public. However, the ALJ also acknowledged that "there is an inherent conflict between the public's use of these waters and the expectations of an exclusive property interest in the pier slips."

¶ 47. ABKA's marketing materials do nothing to dispel that expectation. One advertisement purporting to explain the dockominium program addresses the purchase price of a slip and the advantages of owning a slip versus renting one. This advertisement asserts that a dockominium can be sold, transferred or passed by inheritance at any time. ABKA and the Association advised prospective buyers to "look into a permanent berth" at the Marina and stated that "individual slips can be owned and transferred by deed." The ALJ commented that without question the initial marketing of the dockominiums "sought to blatantly sell public waters for private benefit." As the ALJ noted, the marketing language was less blatant in more recent versions; however, "dockominium purchasers may still believe they are purchasing permanent rights in public waters as a result of the purchase of a . . . unit."

¶ 48. ABKA argued before the ALJ that a dockominium conveyance is consistent with the public trust doctrine because the language in the Declaration continues to subject dockominium slip holders to state regulation. However, we agree with the ALJ that "[m]arketing of the pier slips . . . could give unit owners a false expectation of a property interest in public waters" and that any restrictions

"could be rendered meaningless once the expectation of a property interest has been established."[6]

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[6] A recent United States Supreme Court opinion lends weight to this expectation. *Palazzolo v. Rhode Island,* 533 U.S. 606, 121 S.Ct. 2448 (2001), could have an impact on whether a purchaser of a dockominium would have a future takings action against the state if his or her riparian real estate interest in a boat slip were later challenged.

Palazzolo was a shareholder in a corporation that purchased a waterfront parcel in 1959, most of which is salt marsh subject to tidal flooding. *Id.* at 2455. In 1971, Rhode Island created an agency (Council) to protect coastal wetlands that included this wetland parcel. *Id.* at 2456. In 1978, Palazzolo obtained sole ownership of the parcel after the corporation terminated. *Id.* In 1983, Palazzolo asked permission to construct a wooden bulkhead and to fill in the entire marshland area. *Id.* Council denied this request. *Id.* In 1985, Palazzolo asked permission to fill in eleven of eighteen wetland acres to build a private beach club. *Id.* Council denied this request on the basis that no compelling public purpose would be served. *Id.* Palazzolo filed an inverse condemnation action, arguing that the wetlands regulation had taken his property without compensation even though the regulation had existed at the time he became the sole owner. *Id.*

In effect, *Palazzolo* indicates that a buyer's acquisition of title, even after regulatory rules become effective, does not bar a takings claim:

> Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.
>
> Nor does the justification of notice take into account the effect on owners at the time of enactment, who are prejudiced as well. Should an owner attempt to challenge a new regulation, but not survive the process of ripening his or her claim . . . under the proposed rule the right to compensation may not be asserted by an heir or successor, and so may not be asserted at all. The State's rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest

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¶ 49. Despite the use of the restrictive language in the Declaration, approval of ABKA's application would give prospective unit owners the expectation that they would gain vested private rights in public waters. ABKA's plan purports to create permanent rights in an area of public water. The ALJ aptly stated that "[c]onversion of all 407 slips to dockominium status would violate long-held notions of the reasonable use of public trust waters by a riparian." We fail to see how the conveyance of 407 separate private property interests in public waters is violative of the public trust doctrine, but the conveyance of 120 separate private property interests in public waters is not. Put simply, the conveyance of 7 or the conveyance of 407 boat slips in the manner proposed by ABKA violates the public trust doctrine.

¶ 50. In essence, a dockominium development attempts to offer a small class of boat owners the exclusive and permanent right to own and to occupy a portion of

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> which was possessed prior to the regulation. The State may not by this means secure a windfall for itself. . . . The Takings Clause is not so quixotic. A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken.

Id. at 2462-63.

Palazzolo suggests that a dockominium owner would have a ripened takings claim in the future if the state, exercising its public trust doctrine responsibility, ever tried to interfere with the owner's entitlement to the appurtenant pier and boat slip.

However, none of the parties in the case at hand have had a chance to address *Palazzolo* and develop arguments regarding its issues; thus, we do not rely on *Palazzolo* in making our decision. We mention it only for its potential implications in cases such as this.

public trust waters and provides access to the waters to a select group of the public, which fails to satisfy the purpose of the public trust doctrine. Catherine Robinson Hall, *Dockominiums: In Conflict with the Public Trust Doctrine,* 24 SUFFOLK U.L. REV. 331, 343 (Summer 1990). A dockominium removes a portion of the public trust area from free availability for the citizens, which directly conflicts with the underpinning and careful limitations of the public trust doctrine. *Id.* Exclusive private ownership of water is completely contrary to the foundation of the public trust doctrine. *Id.*

¶ 51. The DNR may allow individuals to place docks in the water for access and reasonable use of the water by issuing permits but may not allow the passing of title to the water. Cheung, *supra,* at 852. Navigable waters unquestionably belong to the people, and to allow private individuals to claim the dockominium slip space or the water within the slip as a property interest is violative of the public trust doctrine. *Id.* By permitting the conversion of marinas to private dockominiums as ABKA proposed here, the DNR has allowed control over public trust lands to be vested in private individuals, in violation of the public trust doctrine.[7]

CONCLUSION

¶ 52. A boat slip is by definition the water and lake bed between two piers; no one but the state can own the

[7] Because our resolution of this issue disposes of the appeal, we need not address the remaining arguments. *Sweet v. Berge,* 113 Wis.2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

water and the lake bed. Riparian owners do not possess water in a lake, but only the right to reasonable use of the water in the lake; "[r]iparian owners acquire at most the usufructuary right to water based on possession or dominion, but not outright ownership of the water." *Id.* at 839.

¶ 53. ABKA's dockominium proposal allows ABKA and the Association to transfer ownership of public waters to private individuals and therefore is in direct conflict with the public trust doctrine. We therefore reverse the order of the circuit court affirming the ALJ's decision granting ABKA a Wis. Stat. ch. 30 permit.

By the Court.— Order reversed.

¶ 54. BROWN, J. (*dissenting*). I join in the majority's commendation of the ALJ's work.[1] Unlike the majority, however, I agree with the ALJ's reasoning and conclusions. I would affirm the circuit court which affirmed the ALJ's decision.

¶ 55. At bottom, the engine powering the majority opinion is the thought that dockominiums are a marketing "scheme" or "creative manipulation" by which persons purport to sell the water within a boat slip space. The factual predicate for this idea is that the purchaser is not really a riparian owner in the normal sense of the term, but the owner of a lock-box, a small metal enclosure that looks like a post office box. The majority likens this to a ruse because the lock-box is absent any value without the ownership of the water within the slip. What the majority

[1] The ALJ was Jeffrey Boldt.

opinion attempts to do is to outlaw this marketing concept as antithetical to the public trust doctrine.

¶ 56. The factual predicate is wrong and, once we understand the true facts at hand, then the conclusion that the concept violates the public trust doctrine must fall. The purchasers here do not own simply a lock-box. They own more and when we understand what they own, it is apparent that they are common owners of riparian land. I quote the ALJ:

> The individual "condominium unit" owners individually own only a lock-box, similar to a post office box, located in the Harbor House. . . . The lock-box constitutes "the unit" within the meaning of sec. 703.02(15), Stats. The unit is separately and independently owned by each condominium owner and is intended for independent, private use. In itself, the lock-box does not confer riparian status on condominium unit owners.
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> However, the Declaration provides that the unit owners are tenants in common with each other of all of the common elements including all of the riparian real estate and improvements such as the Harbor House, seawall, sidewalk, boat launch, parking lot, docks and, piers and swimming pool. . . . The legal question is whether holding such property in the form of a common element of a Condominium Declaration constitutes "riparian" status under sec. 30.12, Stats. Section 703.04, Stats., provides that: "A unit, together with its undivided interest in the common elements, for all purposes constitutes real property." The individual lock-box condominium unit owners are tenants in common in the property subject to the Declaration, including approximately 20

> acres of riparian property and nearly 4200 feet of riparian shoreline property. . . . Accordingly, riparian status vests from holding these lands in common under the terms of the Declaration.

¶ 57. From the above passage, it is clear that the purchasers are more than simply owners of a lock-box. They are not bogus riparian owners. They share ownership of more shoreline than most individual owners of riparian land in this state. They also share twenty acres of total land. They further share ownership of a swimming pool and a Harbor House. Certainly, the owners do not live on the land. But there is no law that says they have to before they can be considered riparian owners. I think where the majority opinion goes wrong is that it considers the purchasers to be fake riparian owners. They are not. They are real owners, albeit sharing the property in common.

¶ 58. The majority is disturbed by the marketing concept of the sellers. They are disturbed by the notion that the buyers will consider themselves owners of the water. The ALJ spoke to that as well. I quote the ALJ again:

> There is no question that the initial marketing of the dockominiums sought to blatantly sell public waters for private benefit. . . . While the language has been less blatant in recent versions, dockominium purchasers may still believe they are purchasing permanent rights in public waters as a result of the purchase of a condominium unit. Section 7.2 of the Declaration states that each boat slip owner will have "as a limited common element appurtenant exclusively to his unit . . . riparian rights to use of the space beside the pier or piers corresponding to his unit number."

> However, *it is clear that riparian rights derive not from the purchase of a unit as such, but from the common elements which include riparian lands.* (Emphasis added.)

¶ 59. The ALJ had it correct. The purchasers may *believe* they have bought ownership rights to the water. However, this does not mean that they actually own it. If ownership of the water is illegal, and it is, then they have bought only common ownership of the *terra firma* with right of access to the water. If they think they got a raw deal because they bought something they are not entitled to buy, their recourse is to sue the developer or the seller or even the broker for selling an illusion.[2]

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[2] The majority cites *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448 (2001), for the proposition that it "suggests that a dockominium owner would have a ripened takings claim in the future if the state, exercising its public trust doctrine responsibility, ever tried to interfere with the owner's entitlement to the appurtenant pier and boat slip." Majority at ¶ 48 n.6. I disagree with that characterization of *Palazzolo*.

Palazzolo has owned eighteen acres of "coastal wetlands" adjoining uplands in Rhode Island since 1959. *Id.* at 2455. At that time, he subdivided this property into eighty lots. He still owns seventy-four of them. *Id.* He desired to develop the land, but because most of it was marshland, he wanted to add dirt to raise the level of his lots and convert them to dry land capable of development. The applications were denied based on regulations in place before his purchase. *Id.* at 2456. He appealed. The case made its way to the United States Supreme Court.

Three issues were before the Court: (1) whether a regulatory takings claim is categorically barred whenever the enactment of the regulations predates the claimant's acquisition of the property; (2) whether a landowner must file additional applications seeking permission for "less ambitious uses" in order to ripen a takings claim; and (3) whether the remaining permissible uses of regulated property are

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¶ 60. There is nothing inherently wrong or illegal about taking a piece of riparian land and selling it in condominium form so that the end result is many owners of that land. There is nothing inherently wrong with these owners sharing common access to the water and assigning between themselves who is going to get which boat slip. It is not as if the riparian rights are increased by increasing the number of owners. The riparian rights remain the same and those rights are regulated by the DNR. I fail to see how that violates the public trust doctrine. The bottom line is that the water is not sold because it cannot be sold. Any marketing scheme purporting to sell the water within the slip is the selling of an illusion. But we are not today faced with a question of whether the seller should be exposed to suit because it sold an illusion. Our purpose is to ask whether the dockominium owners are real riparian owners. If they are, then they have a right to put a pier in the water and sell the exclusive, perpetual right to have a

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economically viable merely because the property retains a value greater than zero. *Id.* at 2457-58. The Supreme Court held that: (1) the claims were ripe for adjudication, *see Id.* at 2462; (2) acquisition of title after the effective date of the regulations does not bar a takings claim, *see Id.* at 2464; and (3) since there was undisputed value of a portion of his land, he was precluded from making a claim that the denial deprived him of all economic use. *See Id.*

Palazzolo was therefore about a person who owned *terra firma*; it was not about a person claiming to own a bed of water. It was about whether a regulation in place before an owner's purchase could bar his takings claim to land for which he had valid title. It was his land. He owned it. The Supreme Court said that even if he bought valid title after a regulation was in place, he could still claim that a takings occurred. The opinion says nothing about whether a person would have a takings claim for something he or she never validly owned in the first place. In sum, *Palazzolo* is totally irrelevant to the issues in this case, both factually and analytically.

pier in the water subject to DNR regulations. The bottom line is that a change in ownership is not a violation of the public trust doctrine and that is all this is: a change in ownership from one big hotel concern to many different persons who own big boats.

¶ 61. I add that I view the dockominium concept under the facts of *this* case as passing muster. If the purchasers were to own no riparian land and were sold only the pier slips, I believe that this status would be illegal. But this is because the purchasers would not be riparian owners, not because the purchasers believed they were purchasing ownership in the water appurtenant to a pier. I can think of several other instances where the dockominium project would probably not get off the ground. But this is not the time to discuss them. Suffice it to say, each project must stand or fall on its own facts.

¶ 62. Before leaving this subject, I quote the ALJ once more:

> [C]ondominium ownership of the marina does not in itself violate the public trust doctrine. Conversion of all of the pier slips to dockominium status would violate the public trust doctrine and would be detrimental to the public interest in maintaining public access to public waters. However, complete rejection of the proposed dockominium conversion would unfairly discriminate against the condominium form of ownership. Riparian owners in Wisconsin, including riparians who gain such a status by holding land in common through the condominium form of ownership, have the limited right to place a reasonable number of pier slips in public waters to gain access to said waters. The condominium unitholders in this matter own riparian lands in

> common with other unit holders including ABKA. . . . Condominium unit-owning riparians are entitled to no more and no less access than other riparians.

¶ 63. I agree with the sentiments expressed by the ALJ. The dockominium concept is simply a creative means by which to convey riparian land. It does no violence, per se, to the public's right to use the waters. Riparians have always had rights of use to the water. The dockominium concept does not change that fact. These rights of use are regulated by the DNR on behalf of the public. This does not change with the advent of dockominiums.

¶ 64. If the public trust doctrine is not violated by the dockominium concept, then we get to the next two questions, whether the DNR had the power to reduce the number of slips that the condominium owners could enjoy and, if so, whether the exercise of that power was reasonable. The parties briefed these issues voluminously and raised and argued sub-issues. If this were the majority opinion, I would address each point made. But in a dissent, it is unnecessary. All I need to do is get my point across.

¶ 65. ABKA notes that it originally had a permit from the DNR to put up 407 piers when it owned the property by itself. Since all that has occurred is a change in ownership from one owner to multiple owners of riparian land, ABKA asserts that there is no justification for the DNR to regulate the conversion. ABKA observes that this was always a private dock, never a public dock. It then reasons that the public trust doctrine is not violated by maintaining the status quo. ABKA argues that the riparian use is not changed and since it is not changed, the use of the waters is not changed and the DNR simply has

no authority to come in absent a change in the use. ABKA therefore asserts that its permit is still good.

¶ 66. I disagree. As ABKA itself stated at oral argument, the docks in question here are meant to harbor big boats. I now quote a statement made during oral argument by ABKA's counsel: "This case is really about one rich person who leases versus one rich person who owns, not the average little guy who wants to take his family out for an outing. This is not a meaningful distinction relevant to the public trust doctrine." I agree that this case is about big boat owners who own riparian land versus big boat owners who lease slips on a seasonal basis. But just because we are not dealing with "the little guy" does not mean that the public trust doctrine is irrelevant.

¶ 67. The burning question is still *access*. The person who can afford to own a big boat, but who does not have a riparian right, is entitled to access to the lake just as is the person with a similar size boat who does have riparian status. There are simply too few places in Wisconsin's inland waters for people with big boats. Lake Geneva is one lake where big boats can harbor. The DNR's concern here is about access to that lake. If ABKA's dockominium were to end up taking away all availability for leasing, the person who had a big boat but did not have riparian rights, would have less access to the water. I would ask: where is that person going to go? This is why, in my opinion, the conversion plan is the business of the DNR, because the DNR is in the business of assuring access to everybody, even wealthy people.

¶ 68. And when the DNR looked at the facts surrounding the conversion plan, this is what it found, as evidenced from the record before the ALJ. There are three

ways to access water: (1) by being a riparian owner, (2) by renting a slip, and (3) by public access. In the case of big boats, public access ramps are simply unfeasible. It takes time and money to launch these big boats and time and money to get them out. So, that leaves renting or riparian access. The ALJ cited testimony from a warden that ABKA's conversion would reduce the number of slips available on Lake Geneva by almost half. It stands to reason that, if the number of available slips for big boats on Lake Geneva is reduced by half, access is compromised. That is just common sense. And that is what ultimately drove the DNR's determination in this case.

¶ 69. As the ALJ related, one witness testified how she and up to 100 of her friends were forced to leave the Abbey because of the high cost ($46,500) of purchasing a pier slip, paying taxes and meeting condominium assessments. Similar sentiments, along with a deep sense of regret, at having been *forced off Lake Geneva* because of the high costs, were expressed by another witness.

¶ 70. The ALJ correctly observed that the public trust doctrine reflects an effort by the law to balance the rights of riparians with the rights of the public in waters held in public trust. What constitutes reasonable use, under the common law test, is a factual determination, varying from case to case, which includes factoring the subject matter of the use and the occasion and manner of its application. The ALJ concluded that the "subject matter of the use" and the "occasion and manner of its application" at the Marina would be changed fundamentally if the entire Marina were converted to dockominium status and the boat slips were no longer regularly and consistently made available to the public by way of seasonal rental. I agree. I conclude that the DNR had the

authority to step in to protect the owners of big boats who are not riparian owners. As I expressed before, these people are members of the public and entitled to access just like anyone else. The public trust doctrine is *not* irrelevant to these people as ABKA contends.

¶ 71. The only remaining question is whether the DNR's determination that 287 of the 407 slips remain available to the public is reasonable. Here, the DNR is accorded great discretion. The facts and circumstances support this determination. I would affirm the circuit court which affirmed the ALJ's decision which upheld the DNR's determination.

STATE OF WISCONSIN | CIRCUIT COURT | WALWORTH COUNTY

ABKA LIMITED PARTNERSHIP, et al.

Petitioners,

vs.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Case Nos. 96CV436, 96CV438, 96CV602, 96CV605, 96CV607

Respondent.

FACTS

(Filed Jun. 4, 1999)

ABKA Limited Partnership (hereinafter "ABKA") has owned the Abbey Harbor and Marina on Lake Geneva since 1973. The marina includes 407 boat slips. In 1994, ABKA decided that it would change the ownership structure at the marina into condominiums so that it could sell portions of the marina while retaining some of the property. A Condominium Declaration was filed February 28, 1995. A condominium unit consists of a lock-box with appurtenant rights to use a pier slip which corresponds numerically to the lock-box. Purchasers of a "dockominium" unit were required to become members of the Abbey Harbor Condominium Association, Ltd (hereinafter "Association").

ABKA filed an application with the DNR to authorize the conveyance of the existing marina to a condominium

form of ownership. The Association later joined in the application. The permit application was objected to by the Geneva Lake Conservancy and was therefore referred to the Division of Hearings and Appeals for a contested case hearing. The matter was heard by Administrative Law Judge Jeffrey Boldt November 13 to 17 and December 18, 1995.

On July 29, 1996, the administrative law judge (hereinafter "ALJ") issued a decision concluding that to prevent the dockominium status from violating the public trust doctrine 287 boat slips must be set aside for public rental at a reasonable fee. The marina's permit was modified to include this condition. ABKA, the Association, the Wisconsin Realtor's Association (hereinafter "WRA), and the Wisconsin Association of Lakes (hereinafter "WAL") all timely filed for judicial review of the ALJ's decision under Ch. 227, Wis. Stats. The cases were consolidated to this Court. Summarily, ABKA, the Association and WRA argue that the DNR has no right to step in and regulate the number of slips to be held out to the public. WAL argues that the condominium form of ownership should not be allowed at all and asks the Court to reverse the Order and Permit.

All parties have filed briefs and oral argument was held February 19, 1999. There was an attempt to supplement the briefs by ABKA to which the remaining parties strenuously objected. The Court will not consider that supplemental brief in making its decision. In addition, ABKA in its petition for judicial review asks the Court to review the denial of their motion to dismiss for lack of subject matter jurisdiction in the administrative proceeding. This request is not supported in ABKA's brief nor is it

mentioned anywhere in the court file. The Court declines to review this denial of the motion to dismiss.

STANDARD REVIEW

The scope of review for agency decisions is set forth in § 227.57, Wis. Stats.:

> (1) The review shall be conducted by the court without a jury and shall be confined to the record . . . (2) Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action . . . , it shall affirm the agency's action. . . . (4) The court shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure. (5) The court shall set aside or modify the agency action if it finds that the agency erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law. (6) If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record. (8) The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent

> with an agency rule, an officially stated policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion. . . . (10) Upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it. The right of the appellant to challenge the constitutionality of any act or of its application to the appellant shall not be foreclosed or impaired by the fact that the appellant has applied for or holds a license, permit or privilege under such act.

The standard of review for agency decisions depends on whether the issues presented are questions of law or questions of fact. If the issue presented is a question of law, including a question of statutory interpretation, the Court applies one of three levels of deference to the agency conclusion: "great weight", "due weight", or "de novo". *Knight v. LIRC*, 220 Wis. 2d 137, 147, 582 N.W.2d 453 (Ct. App. 1998), citing *Sauk County v. WERC*, 165 Wis. 2d 406, 413-14, 477 N.W.2d 267 (1991).

> The 'great weight' standard is the highest level of deference given to an agency conclusion of law or statutory interpretation. (Citation omitted). This level of deference is accorded to an agency conclusion when the following four elements are met: (1) the agency is responsible for administering the statute, (2) the agency conclusion or interpretation is long standing, (3) the agency employed its specialized knowledge or expertise in forming the conclusion or interpretation, and (4) the agency interpretation provides consistency and

uniformity in the application of the statute. (Citation omitted). Under this standard, a reviewing court must uphold the agency interpretation if it is reasonable and if it is not contrary to the clear meaning of the statute. (Citation omitted).

The 'due weight' or 'great bearing' standard is the second highest level of deference given to an agency conclusion of law or statutory interpretation. (Citation omitted). This level of deference is used if the agency interpretation is 'very nearly' one of first impression. (Citation omitted). Under the due weight standard, '[the court] will not overturn a reasonable agency decision that furthers the purpose of the statute unless [the court] determine[s] that there is a more reasonable interpretation under the applicable facts than that made by the agency.' (Citation omitted).

Finally, the 'de novo' standard is the least deferential. (Citation omitted). It is used if the agency conclusion of law or interpretation is one of first impression. (Citation omitted). No weight is given to the agency interpretation when this standard is employed.

Additionally, if the issue presented concerns a question of fact, the 'substantial evidence' standard of review is employed. (Citation omitted). Pursuant to § 227.57(6), STATS., . . . agency findings, of fact will be affirmed if they are supported by substantial evidence. (Citation omitted). Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' (Citation omitted) Therefore, an agency conclusion of fact will not be set aside unless it is found that such a conclusion

> could not have been reached by a reasonable person acting reasonably. (Citation omitted).
>
> Generally, this court cannot evaluate the credibility of weight of the evidence on any finding of fact (Citation omitted). Instead, the reviewing court must examine the record for substantial evidence which supports the agency's conclusion.

Knight, *supra*., at 148-149.

ISSUES PRESENTED

1. Is the ALJ's decision to require that 287 slips be set aside for public use arbitrary and capricious?
2. Does the condominium form of ownership *per se* violate the public trust doctrine?
3. Does the permit constitute a taking of private property without just compensation?
4. Does the doctrine of estoppel apply?
5. Is NR 236.04(8) of the Wisconsin Administrative Code a valid rule and applicable in this proceeding?
6. Does the DNR have jurisdiction to require a Ch. 30 permit in this case?
7. Is the 1991 Program Guidance a valid rule and applicable in this proceeding?
8. Does the Condominium Declaration violate Chs. 30 and 703, Wis. Stats.?

The Petitioners collectively allege that the decision of the DNR was issued without jurisdiction; arbitrary and capricious; unsupported by substantial evidence in the record; based on erroneous interpretations of law; inconsistent with prior and present agency rules, policies or

practices; a violation of agency procedure; otherwise not supported by facts and applicable law; unconstitutional; and an abuse of agency discretion.

DISCUSSION

1. IS THE ALJ'S DECISION TO REQUIRE THAT 287 SLIPS BE SET ASIDE FOR PUBLIC USE ARBITRARY AND CAPRICIOUS?

ABKA and the Association argue that it is. They assert that there was no credible evidence presented at the hearing to support the ALJ conclusion. The DNR asserts that the ALJ considered the relevant evidence and made a reasoned determination.

The ALJ stated his finding as follows:

> . . . after considering all of the evidence, the ALJ finds that a reasonable use of this riparian frontage would involve the placement of no more than 120 pier slips exclusively held for private riparian usage. Accordingly, the applicants must set aside 287 slips for public rental to maintain an equivalent public benefit as is gained from the instant configuration. This number is substantially higher than the reasonable use threshold of 82 to 83 exclusively private riparian slips resulting from a strict application of the 1991 Program Guidance threshold. (Exhibit 75) However, the record supports a somewhat higher number because: a) the piers have been in place for an extended period and no new adverse direct environmental consequences would be experienced; b) because the waters in the area of the site are not now regularly used by the public for any purpose other than the ingress and egress of

> boats out of the facility; and c) there is a public boat launch at the site. These factors justify approval of a number approximately 50 percent higher (120 versus 82 or 83) than the threshold that would be considered a reasonable use of the property based upon years of Department experience with similar facilities across the state. (Exhibit 75) . . . (Decision, Finding #59)

When applying the arbitrary and capricious standard, the Court determines whether the agency's action had a rational basis, not whether the agency acted on a basis of factual findings. *Sterlingworth Condominium Ass'n v. DNR*, 205 Wis. 2d 710, 730, 556 N.W.2d 791 (Ct. App. 1996). On this issue, the Court affords great weight to the ALJ's conclusion. The agency used specialized knowledge and expertise in forming its conclusion. The Court finds that the ALJ's decision reflects careful consideration of the voluminous testimony offered over five days of hearings.

ABKA wanted to convey all 407 slips as dockominium units or in the alternative, at least 207 slips. This is based on an agreement ABKA had with the DNR whereby the DNR agreed not to argue that more than 200 slips be set aside. The ALJ explained further that,

> The record does not support authorizing 207 slips for sale. This number apparently was obtained by an effort at a compromise 'deal', that was, on its own terms, not binding on the ALJ. Mr. Johnson testified that his own professional judgment, at least originally, was that the Program Guidance threshold should be followed and that 324 slips should be set aside for public rental. (TR, Johnson, p. 1507) The record supports a number somewhere between 200 and 324. The applicants are placing a substantial number of piers into

> public waters. This placement is reasonable only if there is a compensating public benefit of offering 287 slips available for public use. If the applicants no longer wish to operate a marina facility which consistently makes public access to the public waters of Geneva Lake possible by the seasonal rental of pier slips, then the size and scale of the massive encroachment on public waters must be reduced to moor no more than 120 boats. (Decision, Finding #59)

The ALJ applied the DNR's own non-binding guidance which "attempts to incorporate case law and provide a threshold for field staff making 'reasonable use' determinations." (Decision, Finding #51).

> Under a strict application of the reasonable use Guidance, the applicants, owners of approximately 4100 feet of riparian frontage, would be entitled to place no more than 82 or 83 pier slips in public waters at the site. (TR, Nesta, p. 883) Nesta testified that the Department analyzed the instant pier permit application using factors articulated in the Guidance, which itself was an effort to make concrete the evolving concepts of public trust case law. The Guidance recognizes, that public marina facilities provide a public benefit, access to public waters for non-riparians, that is not provided by strictly private riparian moorings. (Exhibit 75, p. 4) Under the Guidance and Department policy, to be treated as a "marina or other similar mooring facility" within the meaning of sec. NR 326.04(8)(f), Wis. Admin. Code such facilities must ' . . . be open to the general public.' Further, '(i)n order to qualify, such facilities must provide all berthing facilities which exceed the 'reasonable use' guidelines to

> the general public free or for a reasonable fee. (Exhibit 75, p. 4) (Decision, Finding #53).
>
> . . .
>
> Conversion of all 407 slips to dockominium status would violate long-held notions of the reasonable use of public trust waters by a riparian. To comport with a reasonable riparian use, a substantial majority of the pier slips must either be eliminated or must continue to be made available to the public for seasonal rental. Conversion of all 407 slips to the, dockominium form of ownership would violate the public trust doctrine and the common law notion of 'reasonable use' of public waters by a riparian. (Decision, Finding #57).

Based on the Court's review of the record made before the ALJ, the Court is convinced that the factual determination made by the ALJ that only 120 slips could be sold is based on substantial evidence in the record and was made on a rational basis. The Court affirms the Department's finding that 287 slips must be set aside for public rental.

2. DOES THE CONDOMINIUM FORM OF OWNERSHIP *PER SE* VIOLATE THE PUBLIC TRUST DOCTRINE?

WAL argues that the conveyance of permanent rights to use a portion of the navigable waters of the state violates the public trust doctrine and that the cumulative effects of similar dockominium proposals on other navigable waters must be considered in reviewing the consistency of this project with the public trust doctrine. WAL does not object to the condominium form of ownership; they object to the way in which ABKA and the Association want to apply the condominium form of ownership. WAL

argues that it "purports to grant private parties the perpetual and exclusive right to occupy waters which are owned by the public and reserved for public use." (WAL brief, p. 7) WAL also argues that if ABKA is allowed to proceed with this condominium ownership, other marinas around the state are likely to pursue similar conversions. Further, the department should consider the broad implications this dockominium industry will have on Wisconsin's public waters.

The DNR understands WAL's concerns but feels the best approach is "not to focus on the legal form of ownership ... Rather, the agency has opted to focus on the objective circumstances – the frontage owned by the riparian and the environmental features of the site." (DNR brief, p. 46) The DNR argues it should look at what a reasonable use is for a given property based on the characteristics of the property and the water body.

The ALJ found:

> ... Balancing the rights of ABKA and the Condominium Association members, with the rights of the public to 'use and enjoy' public waters it is clear that prior to the dockominium scheme, the public previously derived the benefit of the availability of seasonal rental of mooring slips on Geneva Lake. This public benefit offset the clearly excessive placement of 407 pier slips on public waters. If all of the pier slips were converted to private dockominiums, which may or may not be offered to the public for seasonal rental, the new use of the public waters would clearly be unreasonable. A 'reasonable use' of the riparian frontage would involve the placement of no more than 120 pier slips.

> The DNR must consider the 'cumulative effects' on public rights when considering an application for a Chapter 30, Stats., permit. *Hixon v. PSC*, 32 Wis. 2d 608, 631-632, 146 N.W.2d 577 (1966). There would be substantial detrimental 'cumulative effects' reasonably anticipated from approval of conversion of all existing structures to 'dockominium' status.
>
> The blanket approval of such a conversion would detrimentally impact public access to public waters if large marinas which previously offered seasonal rentals to the public instead effectively sold such slips to private parties which may or may not re-rent them. Public access to public waters would also be detrimentally impacted because many individuals could not afford to 'buy' a pier slip.
>
> Both of these concerns can be remedied by a permit condition requiring that 287 slips be made available to the public for seasonal rental. (Decision, Findings #10 & #11)

The Court reviews this finding *de novo*. The ALJ considered this, " . . . a matter of first impression under Wisconsin law. The law is silent on the specific issue of whether the dockominium form of ownership is permissible under the public trust doctrine and ch. 30, Stats." (Decision, p. 22) The *de novo* standard is used if the agency conclusion of law or interpretation is one of first impression. *Knight*, *supra*. at 149.

The public trust doctrine has a long history in Wisconsin. Its roots lie in the Northwest Ordinance of 1787 which required that all navigable waters flowing into the Mississippi and St. Lawrence Rivers remain free public highways. When Wisconsin became a state if [sic] 1848, this

requirement was incorporated into the Wisconsin Constitution. *See*, Article IX, § 1. The public trust doctrine is clearly stated in *Illinois Steel Co. v. Bilot*, 109 Wis 418, 426, 84 N.W. 855 (1901) as follows:

> The United States never had title . . . to the beds of lakes, ponds, and navigable rivers, except in trust for public purposes; and its trust in that regard was transferred to the state, and must there continue forever, so far as necessary to the enjoyment thereof by the people of this commonwealth. Whatever concession the state may make without violating the essentials of the trust, it has been held, can properly be made to riparian proprietors.

Inherent to the discussion of the public trust doctrine is Ch. 30, Wis. Stats., and the reasonable use doctrine.

> It is well established that the state hold the beds underlying navigable waters in trust for all of its citizens. *Muench v, Public Serv. Comm'n*, 261 Wis. 492, 501, 53 N.W.2d 514 (1952). The legislature, in furtherance of that trust, has declared it to be unlawful to place any structure on the bed of a navigable water unless a permit has been granted by the DNR, or unless the structure is otherwise authorized by statute. *Cassidy v. DNR*, 132 Wis. 2d 153, 158, 390 N.W.2d 81 (Ct. App. 1986). Sections 30.12 and 30.13, STATS., specify the conditions under which a riparian owner may build a pier without a permit. (Citation omitted)

§ 30.12, Wis. Stats., allows the DNR to grant a riparian owner a permit to build or maintain a structure if the structure does not materially obstruct navigation and is not detrimental to the public interest. The right of "reasonable use" of the water is one of the rights assured

riparian owners. The reasonable use doctrine dates back to the late 1800's. In *Timm v. Bear*, 29 Wis. 254, 265, (1871), the Court stated:

> What constitutes reasonable use depends upon circumstances of each particular case, and no positive rule of law can be laid down to define and regulate such use with entire precision. . . . In determining this question, regard must be had to the subject matter of the use, the occasion and the manner of its application, its object, extent and the necessity for it, to the previous usage, and to the nature and condition of the improvements upon the stream; and so also upon the size of the stream, the fall of the water, its volume, velocity and prospective rise and fall, are important elements to be considered.

In addition,

> What constitutes a reasonable use, under the common law test, is a factual determination, varying from case to case, and subject to trust doctrine concept that sees all natural resources in this state as impressed with a trust for usage and conservation as a state resource. *State ex rel. Chain O'Lakes Assoc v. Moses*, 53 Wis. 2d 579, 582, 193 N.W.2d 708 (1972).

The ALJ reasoned in his discussion that,

> Both 'the subject matter of the use' and 'the occasion and manner of its application' at the marina would be changed fundamentally if the entire marina was converted to dockominium status and the boat slips were no longer regularly and consistently made available to the public by way of seasonal rental. (Decision, p. 25)

The form of ownership is not the key, as the DNR said. The key is the use to which the riparian owners put the pier slips maintained on public waters. ABKA has the burden of showing that the change in use of the marina reflected in the conversion to condominium status would not be detrimental to the public interest within the meaning of § 30.12, Wis. Stats. The ALJ was correct in determining that "conversion of all the slips to dockominium status would be detrimental to the public interest in maintaining public access to the navigable waters of the state and further would result in cumulative detrimental impacts to the maintenance of public access to public waters." (Decision, p. 22) The ALJ specifically found,

> Conversion of all 407 slips to dockominium status would violate long-held notions of the reasonable use of public trust waters by a riparian. To comport with a reasonable riparian use, a substantial majority of the pier slips must either be eliminated or must continue to be made available to the public for seasonal rental. Conversion of all 407 slips to the dockominium form of ownership would violate the public trust doctrine and the common law notion of 'reasonable use' of public waters by a riparian. (Decision, Finding #57)

The DNR's informal guidelines (1991 Program Guidance) reconcile the common law reasonable use doctrine with the statutory limits on a riparian owner's right to the use of a navigable water. *Sterlingworth*, *supra.*, at 731. By applying these guidelines, the department is able to determine a reasonable use that will not have cumulative detrimental impacts on the rights of the public. The Court believes the department properly balanced the rights of the private riparian with the public as a whole. The ALJ also correctly determined that the condominium form of

ownership does not in itself violate the public trust doctrine – the conversion of *all* the slips to the dockominium status would, however, violate the public trust doctrine. That situation was avoided by the ALJ's finding that only 120 slips could be converted to dockominium status. The Court agrees that the condominium form of ownership does not *per se* violate the public trust doctrine.

3. DOES THE PERMIT CONSTITUTE A TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION?

ABKA and the Association argue that the ALJ's decision requiring that 287 slips be set aside for the public constitutes a taking of property without just compensation. DNR argues that there is no taking because the owner will not be deprived of all or substantially all of the use of the property. This argument was not presented in the contested case hearing so there is no corresponding finding by the ALJ with respect to this issue.

ABKA argues that where property is taken for a public benefit rather than to prohibit a public harm, the taking is compensable. *M&I Marshall and Illsley Bank v. Town of Somers*, 141 Wis. 2d 271, 287-288, 414 N.W.2d 824 (1987). ABKA argues there is no public harm caused by the marina structures or the use of those structures so setting aside 287 slips is not a regulation aimed at avoiding public harm. It is an attempt to secure a public benefit in the form of public access across private property to public waters. (ABKA brief, p. 40) ABKA cites a line of cases which prohibit deprivation of all or substantially all of the use of the property. ABKA argues the ALJ's decision is both an occupancy of ABKA's property by the public and an alteration of title to private real property.

DNR responds that ABKA's argument that it must be compensated transforms the qualified rights of riparians to place structures in public waters to an absolute right, the deprivation of which justifies public compensation. (DNR brief, p. 36) Riparian rights are forever qualified and limited by public rights.

The permit conditions authorize ABKA to convert a maximum of 120 slips to condominium ownership. ABKA equates that with the state "taking" the other 287 slips. That is not so. The decision does not require that any slips be made available to the public; it merely caps the number of privately held slips at 120. ABKA can do whatever it wants with the remaining 287. It does not have to offer them for seasonal rental. Indeed, conditions 6 & 7 of the permit read:

> If the applicants choose not to regularly offer boat slips for seasonal rental, the total number of boats permanently moored in the marina shall not exceed 120. The applicant shall not allow more than one boat to occupy any slip other than on a temporary basis.
>
> If the applicants chose to continue operation of a private marina regularly making boat slips available to the public by offering seasonal rentals, the total number of boars [sic] moored shall not exceed 407. (Decision, p. 32)

The Court is not convinced that the conditions placed on ABKA's permit rise to the level of an unconstitutional taking.

4. DOES THE DOCTRINE OF ESTOPPEL APPLY?

ABKA and the Association assert that the DNR should have been estopped from arguing at the contested case hearing for more than 200 set asides based on their agreement. The agreement between ABKA and DNR states in part:

> ABKA will not argue or present evidence at the contested case hearing that the December 19, 1991 DNR Program Guidance on Riparian Berths and Moorings (Program Guidance) is invalid for failure to comply with the rule-making requirements of Ch. 227, Stats. ABKA is free to make any other arguments, including but not limited to, that the Program Guidance does not apply or should not be applied to the Abbey Harbor Condominium. Also, this agreement specifically does not limit any arguments concerning the DNR's jurisdiction over the ownership transfer.
>
> The DNR will not argue or present evidence at the contested case hearing that more than 200 slips should be leased or licensed on a seasonal or shorter basis and that the current size, number and configuration of the structures of the Marina should be reduced. The DNR further agrees that the Marina, in its present form is legally authorized by the State of Wisconsin and the DNR has no objection to the continued maintenance and operation of this facility, and the DNR will not assert a contrary position at the contested case hearing. (Exhibit 16)

ABKA asserts that they relied on this agreement by not selling more than 185 slips before the hearing. Now that

the DNR said they could only sell 120 they will have to buy back 65 units. The ALJ found,

> At hearing, the ABKA raised the issue of estoppel and argued that ABKA relied upon the February 2, 1995 agreement between the applicant and the Department in its decision to sell condominium units. (Exhibit 16) However, any reliance was clearly the result of a calculated business gamble, given the plain language of that agreement which contemplated a decision in the instant matter requiring exactly such a buy-back of previously sold slips. ' . . . Should the decision of the ALJ require more than 125 slips to be set aside for seasonal leasing or licensing, ABKA will repurchase slips to make up the difference.' (Exhibit 16, p. 1) Mr. Antoniou testified that he was familiar with this provision. (TR, p. 134) The record indicated that 185 of the condominium units had been sold as of the date of the hearing. Accordingly, it is expected that ABKA will repurchase 65 units to come into compliance with the terms of the permit set forth below. Any reliance by ABKA was clearly done at its own risk with respect to any claims of reliance or estoppel. (Decision, Finding #92)

The Court reviews this finding *de novo* and determines that estoppel does not apply in this case for the exact reasons stated by the ALJ above.

5. IS NR 326.04(8) A VALID RULE AND APPLICABLE TO THIS PROCEEDING?

ABKA, the Association and WRA argue that NR 326.04(8) is the basis of the DNR's theory that it can require set asides, and the DNR cannot attempt to apply

this rule because the marina was in operation long before the rule was even promulgated. They further argue that the Department acted in excess of its authority in promulgating this rule.

The DNR contends that this is not the department's source of authority to require set asides – the reasonable use doctrine is that authority. Second, the DNR was well within it authority to adopt a rule governing the placement or maintenance of piers.

The ALJ found,

> The provisions of sec. NR 326, Wis. Admin. Code are binding upon the Division for purposes of reaching a decision in this contested case proceeding. Sec. 227.45(4), Stats. The ALJ lacks authority to rule on whether the Department exceeded its lawful authority in promulgating NR 326.
>
> The provisions of NR 326 apply to the instant permit application. NR 326.02(l) and (2)(a), Wis. Admin. Code. (Decision, Conclusions #20 &#21)

This Court reviews the interpretation of law *de novo* and finds NR 326.04(8) does apply to the proceedings.

> Under NR 326, piers associated with marinas and other similar mooring facilities shall not extend into the waters from the shoreline beyond the line of navigation unless a permit is obtained under sec. 30.12(2), Stats. Such marinas shall be open to the public. Use of the facility by the public may be conditioned only on the payment of a reasonable mooring or anchoring fee. NR 326.04(8), Wis. Admin. Code. (Decision, Conclusion #22)

NR 326.02 provides that "this chapter shall apply to all piers and boat shelters constructed or maintained by riparians on the beds of navigable waterways for the purpose of providing improved navigation access to those waterways." The rule is based on the department's interpretation of the public trust doctrine. The rule is applicable because the department has the authority to require that marinas be open to the public. NR 326.04(8) rule embodies that authorization. As the ALJ correctly pointed out, the rule is applicable to this proceeding.

As for the argument that the DNR exceeded its authority in promulgating the rule, the Court finds that the department clearly possessed authority to promulgate this rule. *See*, NR 326.01 and § 227.11(2)(a), Wis. Stats.

The Court affirms the findings of the ALJ.

6. DOES THE DNR HAVE JURISDICTION TO REQUIRE A CHAPTER 30 PERMIT IN THIS CASE?

The central issue in this case is whether the DNR has the authority to require a Ch. 30 permit for the transfer of ownership of the marina. ABKA, the Association and WRA argue that the DNR has not been given any power by the legislature to regulate the form of ownership of riparian property and a strict construction of § 30.12, Wis. Stats., will show same. They argue that statutes giving powers to an agency must be strictly construed to prevent the agency from taking actions not authorized by the legislature. (ABKA brief, p. 17) The DNR has no jurisdiction to require a permit just because the owners decided to make the marina into condominiums.

The DNR counters that they have continuing jurisdiction over riparian structures under different sections of Ch. 30, Wis. Stats., and specifically, the following language in the permits issued to ABKA in 1987[1]: "The Department may change or revoke this permit if the project obstructs navigable waters or becomes detrimental to the public interest." (Exh. 19 & 20).

§ 30.12(2) Wis. Stats., authorizes permits to build or maintain structures in navigable waters but only if they are not detrimental to the public interest. § 30.03(4)(a), Wis. Stats., authorizes administrative enforcement proceedings if the DNR "learns of a possible violation of the statutes relating to navigable waters or a possible infringement of the public rights on navigable waters." § 30.07(2), Wis. Stats., allows the department to modify or rescind any permit for good cause. § 30.14(2), Wis. Stats., authorizes hearings to investigate complaints of a violation of § 30.12, Wis. Stats. The DNR points out that both WAL and the Geneva Lake Conservancy filed complaints under § 30.14, Wis. Stats.

The ALJ found:

> . . . the evidence at the hearing confirmed that the DNR has jurisdiction over this matter given the plain language of the permits . . . ; the implications of the conversion with respect to the 'reasonable use' analysis under the public trust doctrine; the substantial change in use of the marina . . . ; the provisions of sec. 30.07, Stats. . . . ;

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[1] This permit was issued in July of 1987 to authorize four piers which extended beyond the 100' locally established pierhead line.

and the requirement that the DNR consider detrimental cumulative impacts of this proposal and reasonably anticipated similar proposals. . . . Further, there was unrebutted testimony that because the piers in place at the site extended beyond the pierhead line and involved a change in ownership, a review and reauthorization of existing permits was needed under department policy . . . (Decision, Finding #2)

. . .

The Department had sufficient 'cause' within the meaning of sec. 30.07(2), Stats., to modify or rescind the previously issued permits given the direct and cumulative impacts to the public interest associated with conversion to the condominium form of ownership and the proposed closure of the marina that previously provided seasonal rental of boat slips to non-riparian members of the general public. . . . (Decision, Finding #50)

. . .

The complaints filed on or about September 15, 1995, by the Conservancy and WAL under sec. 30.14, Stats., allege that the structures violate Chapter 30, Stats., the public trust doctrine and the Wisconsin Constitution. There is considerable overlap, as the Conservancy acknowledges in its brief, between the issues relating to the instant permit application and the complaints filed under sec. 30.14, Stats. . . . Accordingly, it is appropriate to deal with these issues in summary fashion.

The Department of Natural Resources has made an investigation of its files and concluded as follows:

> 'The Department has concluded, based on the history of this project going back to 1962, that the existing slips in the harbor have been authorized by the State of Wisconsin for use as a public marina facility. The Department does not object to the continued maintenance and operation of these slips as a public marina facility. We have concluded, however, that the proposal by the ABKA Limited Partnership to convert these public marina slips to 'dockominiums' is a substantial change in use to the facility requiring review and possible modification of the existing permit.' . . .

The evidence presented at hearing supports both of these conclusions. However, the term 'public marina' as used in this context is somewhat misleading. The Abbey has always been held privately. Prior to the dockominium scheme, the Abbey regularly and consistently offered boat slips to the public in the form of seasonal rental. The instant permit application thus involves a substantial change in the implied contract between the public, which has provided ABKA with public waters on which [sic] moor boats, and the private operators of the marina. The existing facility represents a massive private encroachment on public waters; the 407 pier slips consume several acres of public waters. Accordingly, the terms of the previously issued permits must be modified to ensure that the marina continues to provide offsetting public benefit. The prior permits are accordingly modified to ensure that the project is not detrimental to the public interest in navigable waters. (Decision, Finding #89)

No deference is given to an agency's decision regarding its own statutory authority. *Wisconsin Power & Light Co. v. Public Service Commission*, 181 Wis. 2d 385, 392, 511 N.W.2d 291 (1994). The Court reviews these findings *de novo*.

The statutes are clear with regard to the continuing jurisdiction of the DNR over riparian structures. § 30.12(2), Wis. Stats., authorizes permits to build or maintain structures in navigable waters but only if they are not detrimental to the public interest. ABKA argues that there is no language in this statute that gives the DNR the authority to regulate whether the permitted structures are used by their owners or by someone else. DNR responds that if that is true then the DNR could authorize a permit for a marina with slips to be available to the public on a seasonal basis but then would not be able to require the marina to maintain that rental status in the future. ABKA originally requested a permit for a marina with slips that would be open to the public. They cannot now unilaterally change those "terms of the bargain."

§ 30.03(4)(a), Wis. Stats., contemplates that a structure which was validly permitted might begin to infringe on public rights because of a change in circumstances. This section gives the DNR the authority to take enforcement action in such a situation. Clearly, the DNR has jurisdiction over structures that have been previously authorized.

§ 30.07(2), Wis. Stats., allows the DNR to modify or rescind a permit for good cause. This certainly gives the DNR continuing jurisdiction over structures that have been previously permitted.

Also, the language in the 1987 permits allow [sic] the DNR to change or revoke the permit if the project becomes detrimental to the public interest. The pending privatization of the Abbey marina is such a situation. The statewide interest and the testimony elicited at the administrative hearing illustrates the importance of this project and its impact on the public interest. "There is no question that a massive shift from seasonal rentals to 'ownership' of pier slips would exclude large numbers of people from access to public inland lakes . . . This is not conjecture . . . but a fact demonstrated by a clear preponderance of largely unrebutted evidence." (Decision, p. 24) It is clear that the project as ABKA proposed it would be detrimental to the public interest. "There would be a net loss of public access to the waters of Geneva Lake as a result of the conversion of all slips to dockominium status." (Decision, Finding #82) The ALJ determined that limiting the number of slips to be held privately would alleviate the detriment.

The Court believes that it is clear that because this proposed conversion of all slips would have detrimental impacts on the public interest the DNR has jurisdiction to step in and "modify or rescind" the permit. The legislature has given the department the authority under Ch. 30, Wis. Stats., to regulate riparian structures.

7. IS THE 1991 PROGRAM GUIDANCE A VALID RULE AND APPLICABLE TO THIS PROCEEDING?

ABKA makes no argument here based on its agreement with the DNR not to do so. The WRA says that the Program Guidance is an unpromulgated rule and thereby invalid under Ch. 227, Wis. Stats., and it should not be

applied in this case. The DNR contends the Guidance is not a rule but merely an informal guide.

The ALJ found,

> The Department of Natural Resources has formulated a nonbinding guidance document which attempts to incorporate case law and to provide a threshold for field staff making 'reasonable use' determinations. (The 1991 Guidance; Exhibit 75) The DNR has consistently used the 1991 Guidance as an analytical tool to approach difficult issues relating to the 'reasonable use' of riparian parcels and the balancing of private and public rights under the public trust doctrine. The Department has not attempted to use this Guidance as a binding non-promulgated code. There is nothing in the record that would indicate that this Guidance document has been used improperly in this matter. The testimony of Mr. Johnson and Ms. Nesta reflected a keen awareness that the Guidance was only an analytical tool and not a rule of law with respect to Chapter 30 permit review. (TR, pp. 1299-1300; TR, p. 813-817) Mr. Johnson testified that the Department considered a September 11, 1992, informal opinion of Attorney General James Doyle in connection with its use of the 1991 Guidance. (Exhibit 97) This informal opinion concluded as follows 'In sum, I conclude that the Department of Natural Resources' development of guidelines to help it administer the program relating to structures in navigable waters is consistent with its duties and authority set forth in the statutes.' (Exhibit 97, p. 4) The record was clear that the Department did not improperly rely on the 1991 Guidance in making its final determination of what constitutes a 'reasonable use' in this case. The Department did

> use the concepts outlined in the Guidance as part of its initial analysis of the project site, but then proceeded, as outlined in the testimony of Ms. Nesta and Mr. Johnson, to make a 'factual analysis' based upon the specific facts of the case, to arrive at its final position. (Decision, Finding #51)

The Court gives great weight to this finding because the guidelines illustrate the DNR's experience and expertise in regulating piers under § 30.12, Wis. Stats. When an agency has particular competence or expertise on an issue, the Court sustains its legal conclusions if they are reasonable. The Court also accords special deference to the agency's decision if it is intertwined with value and policy determinations. *Sterlingworth, supra.*, at 732.

The Court does not agree with WRA's argument that the Guidance Document has been used as a de facto rule. The elements of a rule have not been met. The elements of a rule are:

> (1) a regulation, standard, statement of policy or general order,
>
> (2) of general application,
>
> (3) having the effect of law
>
> (4) issued by an agency
>
> (5) to implement, interpret, or make specific legislation enforced or administered by an agency.

Plumbing Apprenticeship Committee v. DILHR, 172 Wis. 2d 299, 321, 493 N.W.2d 744 (Ct. App. 1992).

The Guidance specifically states that it is not intended to be such a standard. In fact, the Administrator of the Division of Enforcement in signing off on the Guidance "explicitly advised staff that it was not a rule having the effect of law and could not be used or applied as such." (Decision, p. 26) It is simply a tool for field staff attempting to make judgments regarding the balancing of public and private rights. The Guidance admonishes staff to consider the public interest before making permit decisions.

The Court is not convinced that the 1991 Program Guidance is an invalid unpromulgated rule. There is substantial evidence in the record to support its validity as a guide to staff in permit situations. The Court affirms the finding of the ALJ.

8. DOES THE CONDOMINIUM DECLARATION VIOLATE CHS. 30 AND 703?

§ 30.133, Wis. Stats., states in part:

> (1) Beginning on April 9, 1994, no owner of riparian land that abuts a navigable water may convey, by easement or by a similar conveyance, any riparian right in the land to another person, except for the right to cross the land in order to have access to navigable water. This right to cross the land may not include the right to place any structure or material in the navigable water.

§ 703.03, Wis. Stats., states:

> This chapter applies only to property, a sole owner or all of the owners of which submit the property to the provisions of this chapter by duly executing and recording a declaration, as provided in this chapter.

§ 703.27, Wis. Stats., states:

> Zoning and building regulations (1) A zoning or other land use ordinance or regulations may not prohibit the condominium form of ownership or impose any requirements upon a condominium which it would not impose upon a physically identical development under a different form of ownership. No provision of a state or local building code may be applied differently to a building in a condominium than it would be applied to a building of similar structure or occupancy under a different form of ownership unless the different application is expressly permitted in that provision. No subdivision ordinance may apply to any condominium unless the ordinance is, by its express terms, applicable to condominiums.
>
> (2) No county, city or other jurisdiction may enact any law, ordinance or regulation which would impose a burden or restriction on a condominium that is not imposed on all other property of similar character not subjected to a condominium declaration.

ABKA asserts that the DNR is violating § 703.27, Wis. Stats., by trying to regulate this condominium property in ways they do not regulate non-condominium property. They argue that the DNR is attempting to regulate how ABKA uses its property which the DNR never attempted

before the change in ownership. ABKA also objects to the ALJ's conclusion that § 703.27, Wis. Stats., does not apply to the State. If the State were excluded from the statute's coverage, the legislative intent to prevent discrimination against condominiums would be substantially undermined. (ABKA brief, p. 24)

WRA argues that § 30.12, Wis. Stats., the permit section, is a zoning or land use regulation within the meaning of § 703.27, Wis. Stats., because it limits the rights of riparians to use their property as they wish. Under § 703.27, Wis. Stats., no land use regulation may impose a restriction or burden on a condominium that it would not impose on other property. WRA asserts that the DNR is treating the condominium association differently than other forms of ownership contrary to statute.

WAL argues that the Condominium Declaration violated ch. 703, Wis. Stats., because ABKA was the only declarant. The declaration defines elements which include "parcels of the surface of Geneva Lake". The waters are owned by the state so the state should have signed onto it as well. Further, ABKA cannot rightfully subject the waters of Lake Geneva to condominium ownership because it does not hold legal title to same. (WAL brief, p. 19) WAL also argues that the limited common elements interest conveyed by deed to a dockominium unit owner constitutes a conveyance of riparian rights by an "easement or similar conveyance" in violation of § 30.133, Wis. Stats.

The DNR contends that the Condominium Declaration does not convey riparian rights by easement or similar conveyance and, therefore, is not inconsistent with § 30.133, Wis. Stats. The DNR further argues that

§ 703.03, Wis. Stats., does not require the state to be a signatory on the declaration.

The ALJ made the following findings with respect to these issues:

> The Declaration purports to transfer to each unit owner the riparian right to use the space beside the pier or piers corresponding to his/her unit number. . . . However, riparian rights do not obtain from the purchase of the lock-box 'unit'. Rather, riparian rights that vest in the unit owner derive from their holding as a common element the riparian lands adjacent to the harbor. Further, the rights of each unit holder are limited by the public trust doctrine and the 'reasonable use' of riparian property as set forth in this decision. (Decision, Finding #20)
>
> There is no express or implied 'discrimination' against the condominium form of ownership in requiring that 287 pier slips be made available to the public for seasonal rental. The Department has consistently applied the 'reasonable use' concept of the public trust doctrine to all forms of ownership. A marina that no longer regularly offers boat slips for seasonal rental, regardless of the form of ownership, has undergone a substantial change in use that warrants reexamination of permit terms and conditions. (Decision, Conclusion #15)
>
> There is no violation of sec. 703.27, Stats., relating to zoning and building regulations. No 'zoning or building regulations' are implicated in the instant sec. 30.12, Stats., permit proceeding. The instant permit as set forth below imposes no burden or restriction, of any kind, on the permitholder which would not be applied to a similarly

situated marina seeking to end regular seasonal rentals to the public. (Decision, Conclusion #16)

On its face, sec. 703.27, Stats., does not apply to the State. *State ex rel. Martin v. Reis*, 230 Wis. 683, 689 (1939). The Attorney General has opined that statutes of general application do not apply to the state unless the state is explicitly included by appropriate language. (69 O.A.G. 103, 1980) (Decision, Conclusion #17)

An individual condominium unit owner owns the lock-box unit in the Harbor House. A condominium unit, together with its undivided interest in the common elements, constitutes real property for 'all purposes'. Sec. 703.04, Stats. (Decision, Conclusion #18)

. . .

The structures as described above will not 'violate' sec. 30.12, Stats. so long as the facility is operated in accordance with the permit conditions set forth below. The permit conditions set forth below are necessary to preserve and protect the navigable waters held in trust for the public. (Decision, Conclusion #24).

The Court reviews the ALJ's conclusions *de novo*.

Members of the Abbey Condominium Association own a unit defined as "that separate area of the condominium intended for independent, private use, comprised of a cubicle of space defined by a 'lock box' located within the Harbor House as shown on the condominium plat." (Exh. 18B, § 5.2) The unit owners are tenants in common with each other of all of the common elements which include all the real estate and improvements, i.e., the Harbor House, seawall, sidewalks, boat launch, parking lots, docks and

piers, and swimming pool. (*Id.*, §§ 6 & 8.1) Some of the common elements are reserved for the exclusive use of a particular unit owner and are called limited common elements. The right of a unit owner to use a boat slip is a limited common element. (*Id.*, § 7.2) The members' riparian status vests from holding the riparian real estate in common under the terms of the Declaration. The Court agrees with the ALJ's analysis: "Designation of the individual pier slips as limited common elements relates to the allocation of riparian rights among members of the Association, who are riparians, rather than the conveyance of riparian rights to non-riparians. Accordingly, the Condominium Declaration does not constitute a violation of sec 30.133, Stats." (Decision, Finding #36) The unit owners are riparians within the meaning of § 30.133, Wis. Stats., but the use of the pier slips is not an "easement or similar conveyance" of riparian rights within the meaning of § 30.133, Wis. Stats. The riparian owners are simply allocating their property – they own it as tenants in common with other riparian owners. Further, it is clear that a person cannot maintain an easement over his own land.

With respect to WAL's argument that the state is not a signatory on the Condominium Declaration but should be, the Court finds that the Condominium Declaration does not convey title to the waters of Lake Geneva. In fact, the Declaration expressly acknowledges that the state's rights under the public trust doctrine limit the interest obtained by unit owners. (Exh. 18B, § 7.2).

ABKA argues that the DNR is violating § 703.27, Wis. Stats., by trying to regulate condominium properties in ways they do not regulate non-condominium properties. The DNR's policy regarding treatment of riparians applies

to all riparian owners regardless of how the property is owned. "Basically, condominium developments are entitled to no more and no less than any other riparian with respect to the reasonable use of a riparian tract." (Decision, Finding #13) The DNR regulates riparians, not condominium owners.

Finally, WRA attempts to characterize § 30.12, Wis. Stats., as a land use regulation because it limits the rights of owners of real property from using the property as they wish. This section, however, applies equally to riparians who are condominium owners and riparians who are not.

The Court affirms the findings of the ALJ that the Condominium Declaration does not violate § 30.133, Wis. Stats., and the DNR is not discriminating against the condominium form of ownership.

CONCLUSION

Based on the above discussion, the Court finds no grounds exist under § 227.57, Wis. Stats., to reverse or modify the decision of the ALJ in this case. The ALJ's decision is affirmed. Defendant is ordered to prepare Findings of Fact, Conclusions of Law and Judgment consistent with this decision to be filed with this Court within 10 days.

Dated: June 4, 1999

BY THE COURT:

/s/ Michael S. Gibbs
Judge Michael S. Gibbs

CIRCUIT COURT
STATE OF WISCONSIN WALWORTH COUNTY
BRANCH 4

ABKA LIMITED PARTNERSHIP, et al.,

Petitioners,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent.

Case Nos.
96-CV-436, 96-CV-438
96-CV-602, 96-CV-605,
96-CV-607

FINAL ORDER DENYING PETITIONS FOR REVIEW

Having considered the record in this matter, as well as the briefs and oral arguments of the parties, the court has determined that none of the grounds specified under Wis. Stat. § 227.57 exist that would support reversing or modifying the decision of the administrative law judge that is under challenge in these consolidated actions. Accordingly, for the reasons set forth in the court's memorandum decision of June 4, 1999, the court hereby affirms the ALJ's decision in its entirety and denies all the petitions for review.

Dated this 24th day of June, 1999.

BY THE COURT:

/s/ _____
The Honorable Michael S. Gibbs
Circuit Court Judge

DECISION

DATED AND FILED
NOTICE

December 10, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.
A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and Rule 809.62, Stats.

No. 97-0119
STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

ABKA Limited Partnership, an Illinois limited partnership, and The Abbey Harbor Condominium Association, Ltd., a Wisconsin nonprofit corporation,

Petitioners,

DFS Development, Inc., an Illinois corporation, Charles E. Eklund, and Chicago Title Insurance Company, a Missouri corporation,

Appellants,

v.

Wisconsin Department of Natural Resources, an executive department of the State of Wisconsin, created by s. 15.34, Stats., and Geneva Lake Conservancy, Inc.,

Respondents-Respondents.

APPEAL from an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. DFS Development, Inc., Charles E. Eklund and Chicago Title Insurance Company appeal from an order denying their motion to intervene in a ch. 227, Stats., review of a Department of Natural Resources permit proceeding. The appellants sought to challenge the order of the Davison of Hearings and Appeals that 287 out of 407 boat slips in the Abbey Harbor and Marina on Geneva Lake must be set aside for public rental. We conclude that the circuit court properly exercised its discretion under § 227.53(1)(d), Stats., in denying the motion for intervention. We affirm the order.

ABKA Limited Partnership owns the Abbey Harbor and Marina on Geneva Lake. The marina includes 407 boat slips, ABKA decided to sell ownership rights to the boat slips by a condominium declaration filed February 28, 1995. Any purchaser of a "dockominium" unit was required to become a member of the Abbey Harbor Condominium Association, Ltd. Appellants DFS Development and Eklund each purchased a dockominium unit in April 1995. Chicago Title issued a policy of title insurance for each purchase.

ABKA filed an application with the Department of Natural Resources to authorize the conveyance of the existing marina to a condominium form of ownership. The condominium association later joined in the application. The permit application was objected to by the Geneva Lake Conservancy and was therefore referred to the Division of Hearings and Appeals for a contested case hearing. The

matter was heard November 13 to 17 and December 18, 1995. The appellants did not participate in the proceeding.

On July 29, 1996, the administrative law judge issued a decision concluding that to prevent dockominium status from violating the public trust doctrine, 287 boat slips must be set aside for public rental at a reasonable fee. The marina's permit was modified to include this condition. Numerous interested parties timely filed for judicial review of the decision under ch. 227, Stats. On October 17, 1996, the appellants moved to intervene in the review proceeding.

The appellants claim that they are entitled to intervene as a matter of right under § 803.09(1), Stats.[1] The respondents argue that § 227.53(1)(d), Stats.,[2] is the exclusive provision governing whether the appellants may participate in the review proceeding after their failure to timely

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[1] Section 803.09(1), Stats., provides:

Upon timely motion anyone shall be permitted to intervene in an action when the movant claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties.

[2] Section 227.53(1)(d), Stats., provides:

The agency and all parties to the proceeding before it, shall have the right to participate in the proceedings for review. *The court may permit other interested persons to intervene.* Any person petitioning the court to intervene shall serve a copy of the petition on each party who appeared before the agency and any additional parties to the judicial review at least 5 days prior to the date set for hearing on the petition. [Emphasis added.]

file a petition for review.[3] If enumerated conditions are met, intervention under § 803.09 is mandatory whereas § 227.53(1)(d) is permissive in providing that interested persons may be allowed to intervene. The mandatory provision in § 803.09 cannot override the permissive provision in § 227.53(1)(d). *See* ***Wagner v. State Med. Examining Bd.***, 181 Wis.2d 633, 639, 511 N.W.2d 874, 877 (1994) ("[W]hen a conflict occurs between the rules of civil procedure and ch. 227, the dictates of ch. 227 must prevail."). Thus, whether to allow interested persons to intervene in a ch. 227 review proceeding is discretionary with the circuit court. *See* ***Town of Delavan v. City of Delavan***, 160 Wis.2d 403, 415, 466 N.W.2d 227, 232 (Ct. App. 1991).

In exercising its discretion, the trial court should consider whether the movant has standing and whether the movant's interest is adequately represented by other parties. *See* ***id.*** These considerations mirror the two requirements in § 803.09, Stats. – whether "the disposition of the action may as a practical matter impair or impede the movant's ability to protect [a property] interest" and whether the "movant's interest is adequately represented by existing parties."

The appellants argue that because ABKA has oversold the dockominiums and there are not presently 287 slips available for public rental, they are adversely affected by

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[3] The appellants read the respondents' brief to argue that the motion to intervene was untimely. The respondents, however, merely point out that the appellants missed the thirty-day deadline for filing a petition for review of the ALJ's decision and thus missed their opportunity to participate in the review proceeding as a matter of right. The motion for intervention was timely filed.

the ALJ's decision and the possibility that ABKA will have to buy back the slips they purchased. The permit does not require ABKA to buy or force the appellants to sell their units back. Although the ALJ's decision makes reference to ABKA's need to repurchase 65 units in order to be in compliance with the terms of the permit, repurchase it [sic] is not required by the decision.[4] Potential repurchase was not an issue litigated in the contested case hearing.

The "repurchase expectation" expressed in the decision arose because prior to making its permit application, ABKA entered into a February 2, 1995, letter agreement with the DNR to set aside at least 125 slips for public rental. The agreement provided, "Should the decision of the administrative law judge require more than 125 slips to be set aside for seasonal leasing or licensing, ABKA will repurchase slips to make up the difference." So it is not the ALJ's decision but the separate agreement ABKA made with the DNR that creates the potential risk of surrender which the appellants may face. The trial court properly exercised its discretion in denying the appellants' motion for intervention based on this

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[4] In addressing concerns about the representations in the dockominium marketing scheme, the ALJ's decision noted, "[B]ecause the permit and Order set forth below will result in the Abbey having to repurchase units previously sold, this issue is not currently necessary for purposes of this decision." In addressing ABKA's claim that it relied on an agreement with the DNR about the number of slips to be held back for public rental, the opinion stated:

> The record indicated that 185 of the condominium units had been sold as of the date of the hearing. Accordingly, it is expected that ABKA will repurchase 65 units to come into compliance with the terms of the permit set forth below. Any reliance by ABKA was clearly done at its own risk with respect to any claims of reliance or estoppel.

asserted potential injury. *Cf.* ***Town of Delavan***, 160 Wis.2d at 411, 466 N.W.2d at 230 (for standing, petitioner must demonstrate that it sustained an injury due to an agency decision and it must be an injury in fact, not a hypothetical or conjectural one).

As to the issue litigated in the proceeding – the number of slips to be held open for public rental – the appellants stand in the same position as ABKA and the condominium association. It is untenable to suggest that ABKA and the association will not pursue the action with the same diligence as the appellants. Two of the appellants are members of the association. Moreover, ABKA and the association will also bear a financial burden should the permit be sustained on review.

When determining whether a party's representation is deemed adequate we look to see if there is a showing of collusion between the representative and the opposing party; if the representative's interest is adverse to that of the proposed intervenor; or if the representative fails in the fulfillment of his duty.

Armada Broad., Inc. v. Stirn, 183 Wis.2d 463, 476, 516 N.W.2d 357, 361 (1994). There is no showing on any of these considerations. The trial court correctly noted that the appellants' interests are adequately represented by other parties. For that additional reason, we affirm the denial of the appellants' motion to intervene.

By the Court. – Order affirmed.

This opinion will not be published. *See* Rule 809.23(1)(b)5, Stats.

CIRCUIT COURT BRANCH II:

STATE OF WISCONSIN: WALWORTH COUNTY:

* * * * * * * * * * * * * * * * * *

ABKA LIMITED PARTNERSHIP, *
THE ABBEY HARBOR *
CONDOMINIUM *
ASSOCIATION, LTD., ET AL, *
* Case No. 96 CV 436
v. *
* Motion
WISCONSIN DEPARTMENT *
OF NATURAL RESOURCES. *
*
* * * * * * * * * * * * * * * * * *

Proceedings held before the HONORABLE JAMES L. CARLSON, Circuit Court Judge, Branch II, Walworth County, Wisconsin, on the 2nd day of December, 1996.

* * *

[39] THE COURT: Well, I am of the opinion that the parties seeking intervention, D. F. Snavely, DFS and Chicago Title, their motion to intervene should be denied under 227.53(1)(d). I reject the argument that 803.09 makes them a party as of right and of necessity. This is basically an appellate review proceeding that is limited and distinct. It is an appeals procedure, an 803.09 in essence, if argued to say that these people should be a matter of right certainly would conflict with 227.53(1)(d) if they were parties of necessity – if they were parties of necessity – well, I reject that they are a party of necessity as this is an application for pier permits under Chapter 30. And first of all, the parties to this pier application are obviously parties to this case. Other parties [40] have intervened. Intervention is a discretionary matter. Under 227.53(1)(b), and as far as the Court is concerned the arguments that have been made, I find and determine as a matter of discretion and exercising discretion to not allow the intervention at this point in time by these parties. Number one, they were not parties to the proceedings below – pardon me – the proceeding before the Administrative Judge; they had reason to know that those proceedings were ongoing; and they have not made a showing to the Court satisfactorily that in any way they were not appropriately, their interests were not appropriately represented in those proceedings. Their rights are derivative by contract rights with the parties to this proceeding. Their rights may be different, but I think they are clearly derivative rights which are properly represented by parties which have every bit as much interest by virtue of that contract as those who are, in other words, already a party to this proceeding. I think the *Town of Delavan v. City of Delavan* case at 160 Wis. 2d, 403 is good authority for exercise of discretion under 227.53(1)(d). I think it's a

fairly comparable situation where a sanitary sewer district, an agent of the town, was not allowed to be joined under the theory that they were adequately represented and discretion was properly exercised. I think the case cited by the intervenors, in particular *Armada Broadcasting, Inc. v. Stirn*, 183 Wis. 2d, 463 is distinguished. That case arose under a necessary party to a, [41] I believe it was an open record case under 803 and under 803.09 the party alleged to have been sexually harassing somebody, had an independent right from the school district. I think that's clearly distinguished here from the exercise of discretion under 227.53(1)(d). And I think for the proposition that the proceeding governing who may be joined as a party in this stage of the proceedings, clearly they rest their oars under 227.53(1)(d) in an appellate proceeding after the decision has been made and it's on appeal and they wish to join. And I think it clearly shows that this is their avenue for seeking to intervene and why the procedures under that Statute are exclusive as opposed to 803.09 cited for that proposition, *State v. Walworth County Circuit Court*, 167 Wis. 2d, 719. I'm not going to cover in detail the various arguments or positions made that there may be issue preclusion or there may be interest difference. Ultimately the Court's review on appeal is limited to certain factors; did the Department exceed its jurisdiction; was its decision arbitrary and capricious; was there any evidence to support its decision? I may be missing one in there but I just can't see where any bona fide and equitable – I haven't heard a good argument why the parties already joined in this case could not adequately represent the matters before the Court and as indicated also there would be no, in theory, point in time or number here where the Court could draw the line if the other title members wanted to jump in, the theory to follow to its [42]

conclusion would mean if they were necessary parties join all of these people. And I simply don't see that as a bona fide argument here. So for purposes of the type of proceedings, I do find that the interest is a contingent one derived by contract again anticipating the decision that was before the hearing examiner, with full knowledge that it was being carried on, was represented by other parties then, and there's adequate representation at this time, and that discretionary intervention under that Statute should be denied.

* * *

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

Application of ABKA Limited Partnership to Transfer Ownership and Modify the Permit for the Abbey Resort Marina, Potawatomi Creek, Village of Fontana, Walworth County, Wisconsin	Case No. 3-SE-95-0080
Hearing Upon Complaints as to Whether Abbey Resort Marina Piers Are or Would Be in Violation of Section 30.12, Stats.	Case No. 3-SE-95-0921

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND PERMIT

On March 13, 1995, ABKA Limited Partnership (the applicant), c/o Anthony Earl, 271 Fontana Blvd., Fontana, Wisconsin, 53125, completed filing an application with the Department of Natural Resources to authorize the conveyance of the existing marina and its permitted structures at the Abbey Resort Marina to a condominium form of ownership and for closure of the marina formerly made available to the public by seasonal boat rentals. The four hundred seven mooring slips would be converted to private "dockominiums," with numerous individual owners holding the riparian lands as a common element under the terms of a Condominium declaration. The current structures, which consist primarily of floating piers built on a polystyrene base, would not be significantly altered except with respect to the

form of ownership and availability to the public for seasonal rental.

On April 5, 1995, the Department received an objection to the permit application from The Geneva Lake Conservancy/Committee to Save Geneva Lake, c/o Mr. Peter B. King, Public Resource Committee Chairman. On April 10, 1995, the Department forwarded the file to the Division of Hearings and Appeals (the Division) for hearing.

Pursuant to due notice including publication, a prehearing conference was held at Elkhorn, Wisconsin, on May 23, 1995.

At the request of the applicant, a Scheduling Order included a timetable for submission of Dispositive Motions. Essentially following that schedule, a Motion to Dismiss for Lack of Subject Matter Jurisdiction was filed May 23, 1995 and last brief received August 2, 1995. On September 1, 1995, the Division entered a Decision and Order denying the Motion to Dismiss. Further, a schedule was set for submission of any complaints pursuant to sec. 30.14, Stats.

Pursuant to due notice hearing was held on November 13-17 and December 18, 1995 at Elkhorn and Madison, Wisconsin, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding.

A briefing schedule was set and the last submittal was received May 29, 1996.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

ABKA Limited Partnership, by

Waltraud Arts, Attorney
Anthony S. Earl, Attorney
Quarles & Brady
1 South Pinckney Street
Madison, Wisconsin 53701

John L. Maier, Jr., Attorney
645 Main Street
Lake Geneva, Wisconsin 53147

Wisconsin Realtors Association, Inc., by

Winston H. Ostrow, Attorney
333 Main Street, Suite 600
Green Bay, Wisconsin 54301

Wisconsin Association of Lakes, Inc., by

William P. O'Connor, Attorney
25 West Main Street, Suite 801
Madison, Wisconsin 53703

Oneida County, by

Lawrence R. Heath, Corporation Counsel
P. O. Box 400
Rhinelander, Wisconsin 54548-0400

Geneva Lake Conservancy, by

Peter B. King, Attorney
P. O. Box 374
Fontana, Wisconsin 53125-0374

Wisconsin Department of Natural Resources, by (the DNR or the Department)

Michael Cain, Attorney
Michael Lutz, Attorney
P. O. Box 7921
Madison, Wisconsin 53707-7921

Richard Wooley
W7532 Oak Ridge Drive
Delavan, Wisconsin 53115

FINDINGS OF FACT

1. ABKA Limited Partnership (ABKA), c/o Attorney Anthony S. Earl, 271 Fontana Blvd., Fontana, Wisconsin, 53125, completed filing an application with the Department for a permit under sec. 30.12, Stats., to authorize conveyance of existing pier structures on the bed of Geneva Lake, Village of Fontana, Walworth County. The Department and the applicant have fulfilled all procedural requirements of sec. 30.02, Stats., relating to publication of public notice.

2. ABKA asserts that the DNR, and thus the Division, are without jurisdiction in this matter because there will be no changes in the number, size or configuration of the pier structures and because the DNR has recognized that the existing structures are authorized by valid sec. 30.12, Stats. permits. On February 2, 1995, there was an agreement between the DNR Secretary George Meyer and Anthony A. Antoniou, Managing General Partner of ABKA. (Exhibit 16) ABKA agreed to file an application for a permit under sec. 30.12, Stats., to seek approval to transfer ownership under the terms of the Condominium Declaration. Further, ABKA reserved its right to make

"arguments concerning the DNR's jurisdiction over the ownership transfer." Both parties agreed to the following language: "Nothing in this agreement limits the authority of the administrative law judge to hear and decide this matter or any legal basis presented at the hearing by any party or raised sua sponte by the administrative law judge." (Id.)

ABKA filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, along with supporting affidavits, on May 23, 1995. On September 1, 1995, the Division entered a Decision and Order denying the Motion to Dismiss. Because the Motion to Dismiss relied "on matters outside the pleadings, i.e., testimony and affidavits," it was treated as a motion for summary judgment. Sec. 802.06(2)(f), Stats. The ALJ held that there were disputed issues of fact as to whether the conversion of the marina to dockominium form of ownership would be "not detrimental to the public interest" within the meaning of sec. 30.12(2), Stats. Specifically, that there were disputed issues of fact as to whether the project would comport with the "reasonable use" of a riparian property under the public trust doctrine. Further, that the express terms of the permits granted the DNR authority to change or revoke the permit if the project obstructs navigation or becomes detrimental to the public interest. Finally, that sec. 30.07(2), Stats. provided the DNR with authority to "modify or rescind any permit," including a sec. 30.12, Stats. structures permit, for "cause." The ALJ held that there were disputed issues of fact relating to all of the above issues, which precluded grant of a summary judgment prior to hearing.

The evidence at the hearing confirmed that the DNR has jurisdiction over this matter given the plain language of the permits ("The Department may change or revoke

this permit if the project obstructs navigation or becomes detrimental to the public interest." Exhibit 19-20); the implications of the conversion with respect to the "reasonable use" analysis under the public trust doctrine; the substantial change in use of the marina, which formerly offered seasonal rental of boat slips to the public; the provisions of sec. 30.07, Stats. (TR, pp. 1638-1639); and the requirement that the DNR consider detrimental cumulative impacts of this proposal and reasonably anticipated similar proposals. (See: Finding 85) Further, there was unrebutted testimony that, because the piers in place at the site extended beyond the pierhead line and involved a change in ownership, a review and reauthorization of existing permits was needed under department policy. (TR, p. 796)

3. The applicant, ABKA, owns real property located in part of the West 1/2 in Section 14, Township 1 North, Range 16 East, Walworth County. The above-described property abuts Geneva Lake as part of an enlargement of Potawatomi Creek which is navigable in fact at the project site.

4. ABKA Limited Partnership (ABKA), is an Illinois Limited Partnership and is an owner of certain riparian property described as follows:

> PART OF THE WEST 1/2 OF SECTION 14, TOWN 1 NORTH, RANGE 16 EAST. VILLAGE OF FONTANA-ON-GENEVA, WALWORTH COUNTY, WISCONSIN DESCRIBED AS FOLLOWS:
>
> COMMENCING AT A CONCRETE MONUMENT FOUND MARKING THE WEST 1/4 CORNER OF SAID SECTION 14; THENCE N 0DEG 21MIN 40SEC W 24.75 FEET; THENCE N 89DEG 38MIN 20SEC E 155.00 FEET TO

THE POINT OF BEGINNING; THENCE N ODEG 21 MIN 40SEC W 1230.85 FEET ALONG THE EAST RIGHT OF WAY OF A PUBLIC HIGHWAY; THENCE S 89DEG 50MIN 20 SEC E 1142.63 FEET ALONG THE SOUTH RIGHT OF WAY OF FONTANA BOULEVARD; THENCE N 88DEG 37MIN 15SEC E218.53 FEET ALONG SAID BOULEVARD; THENCE S 1DEG 26MIN 18SEC THENCE S 4DEG 13 MIN 09SEC W 9.65 FEET; THENCE S 12DEG 40MIN 34SEC E 14.97 FEET; THENCE S 45DEG 21 MIN 19SEC W 8.39 FEET; THENCE S 22DEG 59 MIN 43 SEC E 23.27 FEET TO A POINT HEREINAFTER DESIGNATED "POINT A"; THENCE S 66DEG 36MIN 35SEC W 106.97 FEET; THENCE S 23DEG 23MIN E 64.00 FEET; THENCE S 66DEG 37 MIN W 33.00 FEET; THENCE N 23 DEG 23 MIN W 64.02 FEET; THENCE S 66DEG 54MIN 16SEC W 205.62 FEET; THENCE S 23DEG 37MIN W 33.00 FEET; 16SEC W 205.62 FEET; THENCE S 23DEG 37MIN 14SEC E 82.58 CURVE TO THE LEFT HAVING A RADIUS OF 139.17 FEET ND CHORD S 55DEG 39MIN 46SC E 147.67 FEET; THENCE SOUTHWESTERLY 20.88 FEET ALONG THE ARC OF A CURVE TO THE RIGHT HAVING A RADIUS OF 29 FEET AND CHORD S 40DEG 09MIN 59SEC W 20.44 FEET; THE LEFT HAVING A RADIUS OF 57 FEET AND CHORD S 23DEG 41 MIN 02SEC W 68.79 FEET; THENCE S 13DEG 25MIN 47SEC E 11.577 FEET; THENCE S 23DEG 02MIN 09SEC E 48.68 FEET; THENCE S 69DEG 36MIN 09SEC E 52.19 FEET TO THE CORNER OF ABBEY VILLA CONDOMINIUM; THENCE ALONG SAID CONDOMINIUM THE FOLLOWING COURSES:

S 24DEG 13MIN W 128.72 FEET; THENCE N 89DEG 20MIN W 63.03 FEET; THENCE S 4DEG 30MIN W 68.48 FEET; THENCE S 67DEG 17 MIN W 253.28 FEET; THENCE S 58DEG 14MIN W 114.30 FEET; THENCE S 48DEG 40MIN E 107.62 FEET; THENCE S 15DEG 21 MIN E 95.02 FEET; THENCE SOUTH 32.00 FEET; THENCE S 10DEG 42 MIN E 85.85 FEET; THENCE S 22DEG E 36.00 FEET; THENCE SOUTHEASTERLY ALONG THE ARC OF A CURVE TO THE LEFT HAVING A RADIUS OF 36 FEET AND CHORD S 78DEG 56MIN E 58.66 FEET; THENCE NORTHEASTERLY 308.26 FEET ALONG THE ARC OF A CURVE TO THE RIGHT HAVING A RADIUS OF 323 FEET AND CHORD N 71DEG 28MIN E 296.70 FEET; THENCE S 75DEG 16MIN E 99.94 FEET; THENCE EASTERLY 129.45 FEET ALONG THE ARC OF A CURVE TO THE LEFT HAVING A RADIUS OF 500 FEET AND CHORD S 87DEG 35MIN 30SEC E 129.12 FEET; THENCE NORTHEASTERLY 10.39 FEET ALONG THE ARC OF A CURVE TO THE LEFT HAVING A RADIUS OF 110 FEET AND CHORD N 64DEG 55MIN 53SEC E 10.38 FEET;

THENCE LEAVING SAID CONDOMINIUM S 22DEG 08MIN 06SEC E 59.68 FEET; THENCE N 67DEG 09MIN 19SEC E 30.39 FEET; THENCE S 7DEG 02MIN E 12.53 FEET TO THE NORTHWEST CORNER OF LOT 1 OF PARTRIDGE COURT SUBDIVISION; THENCE CONTINUE S 7DEG 02MIN E 232.00 FEET ALONG SAID SUBDIVISION TO THE NORTHWEST CORNER OF LOT 11 OF COUNTRY CLUB ESTATES UNIT 1 SUBDIVISION; THENCE CONTINUE 2 7DEG 02MIN E 140.00 FEET TO THE SOUTHWEST CORNER OF

SAID LOT 11; THENCE S 7DEG 07MIN E 118.85 FEET TO A POINT IN THE WEST LINE OF LOT 14 OF SAID SUBDIVISION; THENCE S 62DEG 40MIN W 258.47 FEET; THENCE S 32DEG 41MIN E 87.51 FEET TO THE MOST NORTHERLY CORNER OF LANDS DESCRIBED IN DOCUMENT #661499; THENCE S 43DEG 49MIN 30SEC W 174.55 FEET; THENCE S 49DEG 17MIN E 182.90 FEET TO THE NORTHWESTERLY RIGHT OF WAY OF SHABBONE DRIVE; THENCE S 42DEG 33MIN W 61.00 FEET ALONG SAID RIGHT OF WAY; THENCE N 49DEG 17 MIN W 1189 FEET MORE OR LESS TO THE MOST SOUTHERLY CORNER OF ABBEY VILLA CONDOMINIUM PARCEL 5; THENCE ALONG SAID CONDOMINIUM THE FOLLOWING COURSES:

N 50DEG 39 MIN E 441.44 FEET; THENCE N 19DEG 35MIN 10SEC W 135.27 FEET; THENCE N 49DEG 44MIN 15SEC W 27.23 FEET; THENCE N 49DEG 39MIN W 58.29 FEET; THENCE N 57DEG 34MIN 30SESC W 66.38 FEET; THENCE N 62DEG 30MIN 50SEC W 70.34 FEET; THENCE N 59DEG 25MIN 50SEC W 68.76 FEET; THENCE N 61DEG 18MIN 55SEC W 38.62 FEET; THENCE N 30DEG 14MIN 20SEC W 27.39 FEET; THENCE N 81DEG 24MIN 35SEC W 40.06 FEET; THENCE N 63DEG 11MIN 30SEC W 68.82 FEET; THENCE N 56DEG 57MIN 45SEC W 65.41 FEET; THENCE N 51DEG 19MIN 40SEC W 46.04 FEET; THENCE S 27DEG 29MIN W 267.00 FEET; THENCE SOUTHERLY 39.21 FEET ALONG THE ARC OF A CURVE TO THE LEFT HAVING A RADIUS OF 80 FEET AND CHORD S 13DEG 33MIN W 38.82 FEET; THENCE S 0DEG 21MIN E 106.00 FEET;

THENCE S 89DEG 38MIN 20SEC W 35.11 FEET; THENCE LEAVING SAID CONDOMINIUM S 89DEG 38MIN 20SEC W 180.80 FEET TO THE POINT OF BEGINNING, CONTAINING 43.42 ACRES MORE OR LESS. (Exhibit 18)

5. ABKA, on February 28, 1995, filed a Condominium Declaration of the Abbey Harbor Condominium (the Declaration) which changed the form of ownership of the property described in paragraph 1 above to a condominium form of ownership. Immediately after the Filing of the Declaration, ABKA was the owner in fee simple of each one of the 407 condominium units and a tenancy in common interest with respect to the common elements described in the Declaration, while prior to the Filing ABKA held an undivided interest in the Abbey Harbor and Marina (Harbor or Marina). (Exhibit 18, B)

6. All condominium unit Owners are required to be members of the Abbey Harbor Condominium Association, Ltd. (Association) which is responsible for the management and control of the common elements of the condominium and is a Wisconsin non-profit corporation. (Exhibit 18, B, § 9.1, sec. 703.15, Stats.)

7. The Articles of Incorporation and By-Laws of the Association give the Board of Directors the authority to act on behalf of the Unit owners. (Exhibit 144, §§ 703.10, 703.15(3), Stats.)

8. The "unit" is defined as follows in the Declaration:

> A unit is that separate area of the condominium intended for independent, private use, comprised of a cubicle of space defined by a "Lock Box" located within the Harbor House as shown in the Condominium Plat. Each unit shall have outer

> boundaries formed by the interior surfaces of the respective Lock Box bearing the unit designation, all as shown in the Condominium Plat. The dimensions of each unit shall be approximately four (4) inches in width, five (5) inches in height, and six (6) inches in length. Each unit shall include as an appurtenance, standard riparian rights of owners of waterfront real estate under Wisconsin Law, and the use of an assigned boat slip corresponding to the unit designation as a part of the common elements of **THE ABBEY HARBOR CONDOMINIUM**. (Sec. 5.2)

9. The purpose as stated in the application is as follows:

> The purpose, need, and intended use of the Project will be identical before and after the property is subjected to the condominium form of ownership. The purpose is the operation of a marina for the mooring of boats. Four hundred seven boats can be moored currently. The marina does not have facilities for sail boats because of bridge between the harbor and Lake Geneva. The power boats that are moored in the marina range in size from approximately 16 feet to 43 feet excluding bow pulpits and swim platforms. The water depth needed for mooring these boats range from an average of 16 inches to 40 inches depending on boat size. The marina will continue to be used for the recreational purposes that it is currently. The history of the use of the marina demonstrates that there is a need for mooring facilities for individuals seeking to use the waters of Lake Geneva . . .

10. After five days of hearing, a question arose as to who would be the holder of a permit, if one were issued.

On December 11, 1995, the Board of Directors of the Condominium Association met and voted to join ABKA as a co-applicant in this proceeding, Case No. 3-SE-95-0080. (Exhibit 112) The DNR and ABKA stipulated that the Association could be a co-applicant and said stipulation was duly entered in the hearing record. (Exhibit 111) The other parties dispute the legal effect of this stipulation.

11 The DNR's agreement to have the Association be a co-applicant for a sec. 30.12(2), Stats., permit is consistent with its past practice and with its policy guidance regarding permit applications involving multiple ownership of riparian property. (Exhibit 113, TR, Johnson) Accordingly, the Association may hold the permit. (Exhibits 111 and 113)

12. A condominium is a recognized form of property ownership under Wisconsin real property law. (TR, Ouchie, Ch. 703, Stats.) Unlike other condominium units, the lock box itself does not inherently have much value. (TR, Ouchie, p. 327) The value of the "dockominiums", as the Abbey has marketed these unique condominium units, is largely due to the other amenities that are at this location and are part of the individual common area. (Id.)

13. Wisconsin law as expressed in sec. 703.27, Stats., relating to "zoning and building regulations" requires agencies which regulate condominiums to treat them the same as an identical development under a different form of ownership. "No county, city or other jurisdiction may enact any law, ordinance or regulation which would impose a burden or restriction on a condominium that is not imposed on all other property of similar character not subject to a condominium declaration." Sec. 703.27(2), Stats.

No zoning or building regulations are implicated in this decision. Further, even if the language cited above is read more broadly, there is no "discrimination" against the condominium form of ownership in determining that it violates the public trust doctrine for riparians to exceed the reasonable use of riparian lands without offering a compensatory public benefit of making slips available to the public for seasonal rental. The DNR policy, as articulated by Mr. Kenneth Johnson, Assistant Section Chief of the Water Regulation Section, is that condominium developments are entitled to no more and no less than any other riparian with respect to the reasonable use of a riparian tract (TR, p. 1233) This is consistent with the statement of Department policy expressed in the non-binding December 19, 1991 Guidance Document relating to Riparian Berths and Moorings. (Exhibit 75, p.3)

14. The Declaration filed on February 28, 1995, does not involve easements between or among the unit owners. The property is conveyed in either fee simple or as an undivided interest in a tenancy in common. (Ouchie and Jachna testimony, Exhibit 18, B)

15. A "Unit", under the condominium law, is property that is separately owned by each condominium owner and is intended for independent, private use. (Exhibit 18, B. sec. 5.2, secs. 703.02(15), 703.05, Stats.)

16. There is no requirement in condominium law that a condominium unit have more value than the undivided interest in the common elements of the condominium. (Ouchie testimony)

17. A condominium unit, together with its undivided interest in the common elements, constitutes real property. (Sec. 703.04, Stats.)

18. A condominium unit (unit) under the terms of the Declaration is a cubicle of space defined by a lock box located within the Harbor House at the Marina. State law defines unit as a cubicle of air. (Exhibit 18, B, sec. 5.2, Jachna testimony, sec. 703.02(15), Stats.)

19. Each unit has a number which corresponds with a boat slip at the Marina as indicated on the Condominium Plat. (Exhibit 18, B, secs. 5.2, 5.3, Plat, Jachna testimony, sec. 703.02(16), Stats.)

20. The Declaration purports to transfer to each unit owner the riparian right to use the space beside the pier or piers corresponding to his/her unit number. (Exhibit 18, B, sec. 7.2, sec. 703.02(16), Stats.) However, riparian rights do not obtain from the purchase of the lock-box "unit". Rather, riparian rights that vest in the unit owner derive from their holding as a common element the riparian lands adjacent to the harbor. Further, the rights of each unit holder are limited by the public trust doctrine and the "reasonable use" of riparian property as set forth in this decision.

21. Each unit owner is entitled to sell, lease, sublease, rent or license the unit, and with it the right to use the boat slip appurtenant to the unit. (Exhibit 18, B, sec. 10.1, Jachna testimony)

22. Unit owners are required to keep the structures adjacent to the boat slip they are permitted to use in good repair. (Exhibit 18, B, sec. 11.2, Jachna testimony) Unit owners are not permitted to combine adjacent slips. (Exhibit 18, B, sec. 7.4, Jachna testimony) No personal watercraft, such as jet skis, are permitted to be stored by unit owners in the boat slips they are permitted to use in the marina. (Exhibit 18, B, sec. 15.2.11)

23. The Declaration restricts the size of boats to be moored in the marina to 44 feet, except for slip 1204 which may hold a boat up to 55 feet in length. (Exhibit 18, B, sec. 7.2, Jachna testimony)

24. The right of unit owners to use the boat slips does not exclude members of the public from using the waters of the Harbor but only excludes other unit owners from using boat slips that are not appurtenant to their respective units. (Exhibit 18, B, sec. 7.2, Jachna testimony)

25. The unit owners do not have any ownership interest in the water of the Harbor, but are owners in common of the riparian property adjacent to the Harbor. (Exhibit 18, B, sec. 6) However, the marketing of the pier slips by the applicant could give unit owners a false expectation of a property interest in public waters. (See: Finding 91)

26. The placement of riparian structures in, and the use of, the waters of the Harbor are subject to public rights and to permits issued by the State of Wisconsin. (Exhibit 18, B, sec. 7.2)

27. The unit owners are tenants in common with each other of all of the common elements of the condominium including all of the real estate and improvements such as the Harbor House, seawall, sidewalk, boat launch, parking lots, the docks and piers, and the swimming pool, excluding the units. (Exhibit 18, B, sec. 6, 8.1, secs. 703.02(2), 703.13(1), Stats., Snyder and Jachna testimony)

28. The unit owners are tenants in common in the property described in paragraph 27 above, including approximately 20 acres of riparian property and 4,193 feet

of riparian shoreline property. (Exhibit 18, B, Jachna testimony)

29. The rights of a condominium unit owner in the common elements of the Harbor and Marina are no different than the rights of a residential riparian condominium unit owner in the common elements of its condominium. (Ouchie testimony, sec. 703.13(1), Stats.)

30. Certain of the common elements are reserved for the exclusive use of a unit owner and such elements are called limited common elements. (Exhibit 18, B, sec. 7.1)

31. The right of a unit owner to use a boat slip is a limited common element. (Exhibit 18, B, sec. 7.2)

32. The Association has the right to control any alteration of the structures in the marina. Unit owners are not permitted to alter the structures. (Exhibit 18, B, secs. 5.1, 7.5, Jachna testimony)

33. The Association is responsible for the maintenance, repair and replacement of structures at the marina and dredging of the Harbor. (Exhibit 18, B, secs. 9.1, 11.6, Jachna testimony) The Association has the responsibility to maintain the landscaping of the Harbor and Marina. (Exhibit 18, B, sec. 15.2.7, Jachna testimony) The Association has the right to assess the unit owners for the costs associated with the operation, maintenance and repair of the Marina and Harbor. (Exhibit 18, B, secs. 11.6, 14, Jachna testimony) The Association has authority to enforce compliance with the terms of the Declaration. (Exhibit 18, B, sec. 19.1, Jachna testimony) The Association carries insurance covering loss or damage to the common elements. The Association also carries public

liability insurance. (Exhibit 18, B, secs. 13.1, 13.2, 13.4, Jachna testimony.

34. The use of the waters of the Harbor, including the waters in the boat slips, is legally open to members of the public. (Exhibit 18, B, sec. 7.2, Jachna testimony) However, there is an inherent conflict between the public's use of these waters and the expectations of an exclusive property interest in the pier slips. (See: Finding 91)

35. The threshold issue in evaluating this permit application is whether or not the individual dockominium unit owners are riparians under Wisconsin law. A related issue is whether the Condominium Declaration violates sec. 30.133, Stats. That section prohibits an owner of riparian land from conveyance, "by easement or by similar conveyance, any riparian right in the land to another person, except for the right to cross the land in order to have access to the navigable water. This right to cross the land may not include the right to place any structure or material in the navigable water." Sec. 30.133, Stats.

Riparian owners are those who have title to the ownership of land on the bank of a body of water. *Stoesser v. Shore Drive Partnership*, 172 Wis. 2d 660, 665, 494 N.W.2d 204, 207 (1993). There is no question that the applicant and Condominium Declarant, ABKA, owns land on the bank of navigable waters of the state and is, accordingly, a "riparian" within the meaning of sec. 30.12, Stats.

The individual "condominium unit" owners individually own only a lock-box, similar to a post office box, located in the Harbor House. (Exhibit 18, B, § 5. See: Exhibit 72) The lock-box constitutes "the unit" within the meaning of sec. 703.02(15), Stats. The unit is separately and independently owned by each condominium owner and is

intended for independent, private use. In itself, the lock-box does not confer riparian status on condominium unit owners.

However, the Declaration provides that the unit owners are tenants in common with each other of all of the common elements including all of the riparian real estate and improvements such as the Harbor House, seawall, sidewalk, boat launch, parking lot, docks and piers and swimming pool. (Exhibit 18, B § 6, 8.1) The legal question is whether holding such property in the form of a common element of a Condominium Declaration constitutes "riparian" status under sec. 30.12, Stats. Section 703.04, Stats., provides that: "A unit, together with its undivided interest in the common elements, for all purposes constitutes real property." The individual lock-box condominium unit owners are tenants in common in the property subject to the Declaration, including approximately 20 acres of riparian property and nearly 4200 feet of riparian shoreline property. (Exhibit 18, B, Jachna) Accordingly, riparian status vests from holding these lands in common under the terms of the Declaration.

36. The pier slips themselves are described in the Declaration as a "limited common element," within the meaning of sec. 703.02(10), Stats. The right of a unit owner to use a boat slip is a limited common element. (Exhibit 18, B, § 7.2) "Limited common elements" are those common elements identified "as reserved for the exclusive use of one or more but less than all of the unit owners." Sec. 703.02(10), Stats. Under the Declaration, the Association has the right to control alterations to structures, and has the responsibility to maintain the structures. Designation of individual pier slips as limited common elements relates to the allocation of riparian

rights among members of the Association, who are riparians, rather than the conveyance of riparian rights to non-riparians. Accordingly, the Condominium Declaration does not constitute a violation of sec. 30.133, Stats.

At the time of the Condominium Declaration ABKA owned all of the riparian lands adjacent to the marina and harbor. Because it has sold units subject to the terms of the Declaration, ABKA does not exclusively own the riparian lands subject to the Declaration. This land is now owned in common by all of the unit owners. "Each unit owner shall also own an undivided interest in common elements and facilities and limited common elements as a tenant in common with all other unit owners . . . " (Exhibit 18, § 8.1) Under Wisconsin law it is clear that a person "can not maintain an easement over his own land." *Stoesser v. Shore Drive Partnership*, 172 Wis. 2d 660, 667, 494 N.W.2d 204 (1993) The riparian lands are common elements under the Declaration. Such common elements constitute real property "for all purposes" under Wisconsin statutes sec. 703.04, Stats. The Declaration relating to the use of pier slips as limited common elements relates to how riparians allocate their own property. It is not the conveyance by "easement or similar conveyance" of riparian rights within the meaning of sec. 30.133, Stats.

37. The Harbor and Marina were first developed by Project Fontana, Inc. when Potawatomi Creek was dredged to create the Harbor. (Kneibler testimony, Exhibit 8) The parties have entered a stipulation that the description of the public waters in the Harbor area as "Potawatomi Creek or Lake Geneva" is not necessary for resolution of this matter. Further, the parties stipulated that the Village of Fontana Pierhead Line Ordinance applies to the

waters where the Abbey Harbor and Marina are located . . . " (Exhibit 118)

38. Several witnesses testified that the lagoon where the Abbey Resort Marina now resides was previously a wetland complex including the outlet of Potawatomi Creek into Lake Geneva. (Exhibit 2) In 1962, the Public Service Commission (PSC, a predecessor to the Department of Natural Resources) held a public hearing concerning a proposal to dredge the wetland and develop the resulting lagoon into a resort/marina. This proposal, called Project Fontana, was intended to make the area more amenable to development and recreation. (Exhibit 6)

39. From the very outset of the project, it is clear that the proposed marina was to be open to the public. At the 1962 PSC hearing, the testimony of Frederick Gartz, President of Project Fontana, reflects the developers' intentions to construct a marina with 200 boat slips, to be available to the general public. (Exhibit 5, pp 8-9)

40. The PSC held a hearing on January 2, 1962, regarding Project Fontana, Inc.'s Application to dredge the lagoon for the Harbor. During that hearing, a developer of the project was asked the following questions and gave the following answers:

Question: And are you going to have a marina there, too?

Answer: Yes, in the lagoon we intend to have a public boat launching ramp and public slips – 200 slips.

Question: For that many boats?

Answer: And a parking lot for that many cars.

Question: Will this be available to the general public?

Answer: Yes. (Exhibit 5, pp. 8-9)

This understanding and intention was confirmed in the testimony of one of the project founders, Mr. Arthur Kneibler. Kneibler testified that, after the marina was constructed, slips were regularly offered to the general public. (TR, p. 100) Ms. Liesa Nesta, the DNR Area Water Management Specialist who processed the instant permit application, testified that the Department understood from the above testimony and from the operation of the marina that the Abbey facility has always made boat slips available to the public through seasonal rental.

41. The PSC issued Findings of Fact, a Permit, and an Order dated July 27, 1962, authorizing the dredging of the lagoon which became the Harbor. Nothing in that Permit specifically mentioned boat slips. (Kneibler testimony, Exhibit 8)

42. Subsequent to the 1962 PSC hearing, the hearing examiner issued a permit to authorize the dredging and development plans as stated by Project Fontana. (Exhibit 8) The permit contains the following condition:

> AND HEREBY THERE DOES ISSUE AND IS GRANTED to the applicant, Project Fontana, Inc., a permit to construct an enlargement of Geneva Lake as described herein, *subject to the condition that the artificial waterway so constructed shall be a public waterway. Acceptance of this permit shall be deemed acceptance of such condition*. (Emphasis added)

(Exhibit 8, p. 2) Further, the related agreement between the Village of Fontana and Project Fontana, Inc. provides

that the excavated lagoon and channel "will become the property of the State of Wisconsin as navigable water." (Exhibit 4, p. 295)

43. Project Fontana, Inc. later became Project Fontana Limited Partnership. (Kneibler testimony)

44. In 1973, Project Fontana Limited Partnership sold the Harbor and Marina to ABKA. (Kneibler, Antoniou testimony)

45. Anthony A. Antoniou is General Partner of ABKA and has been General Partner since it purchased the Harbor and Marina in 1973. (Antoniou testimony)

46. ABKA Limited Partnership has paid property taxes on the real and personal property at the Harbor and Marina since it became the owner of the property. (Antoniou testimony) Unit holders are assessed property taxes relating to the percentage of property held in common. (TR, p. 490)

47. In 1987, the DNR issued a permit to ABKA for structures in the Harbor beyond the pierhead line. That permit placed no specific restriction on the use of any boat slips in the Harbor. (Exhibit 20)

48. In 1987, the DNR issued a permit to ABKA to place pier crib structures in the Harbor. That permit placed no specific restrictions on the use of any boat slips in the Harbor. (Exhibit 19)

49. From 1962, when the initial dredging of the Harbor was authorized, through the present, DNR has issued numerous permits to dredge and place structures in the Harbor. None of these permits ever contained any specific conditions regarding how boat slips were required

to be used or to be seasonally leased or rented. (Exhibit 106) It would have been a far better practice if the DNR had specifically indicated in the permits that this enormous encroachment on public waters was granted a permit with the understanding that the facility be operated as a marina which regularly made berthing available to non-riparian members of the public in the form of seasonal rentals. However, Ms. Nesta testified that the Department has consistently understood, from the outset, that the marina was initially authorized, allowed to be maintained, and allowed to expand, with the expectation that it would remain a marina offering boat slips to the public for seasonal rental. (TR pp. 939-940) A reasonable inference from the record is that the Department would never have permitted such a large facility if it were not understood to provide the offsetting public benefit of public mooring facilities.

50. The Department had sufficient "cause" within the meaning of sec. 30.07(2), Stats. to modify or rescind the previously issued permits given the direct and cumulative impacts to the public interest associated with conversion to the condominium form of ownership and the proposed closure of the marina that previously provided seasonal rental of boat slips to non-riparian members of the general public. (TR pp. 1638-39)

51. The Department of Natural Resources has formulated a non-binding guidance document which attempts to incorporate case law and to provide a threshold for field staff making "reasonable use" determinations. (The 1991 Guidance; Exhibit 75) The DNR has consistently used the 1991 Guidance as an analytical tool to approach difficult issues relating to the "reasonable use" of riparian parcels and the balancing of private and public

rights under the public trust doctrine. The Department has not attempted to use this Guidance as a binding non-promulgated code. There is nothing in the record that would indicate that this Guidance document has been used improperly in this matter. The testimony of Mr. Johnson and Ms. Nesta reflected a keen awareness that the Guidance was only an analytical tool and not a rule of law with respect to Chapter 30 permit review. (TR, pp. 1299-1300; TR p. 813-817) Mr. Johnson testified that the Department considered a September 11, 1992, informal opinion of Attorney General James Doyle in connection with its use of the 1991 Guidance. (Exhibit 97) This informal opinion concluded as follows "In sum, I conclude that the Department of Natural Resources' development of guidelines to help it administer the program relating to structures in navigable waters is consistent with its duties and authority set forth in the statutes." (Exhibit 97, p. 4) The record was clear that the Department did not improperly rely on the 1991 Guidance in making its final determination of what constitutes a "reasonable use" in this case. The Department did use the concepts outlined in the Guidance as part of its initial analysis of the project site, but then proceeded, as outlined in the testimony of Ms. Nesta and Mr. Johnson, to make a "factual analysis" based upon the specific facts of this case, to arrive at its final position.

51 [sic]. The plain language of the 1991 Guidance does not exempt existing facilities from reasonable use considerations, where, as in the instant application, there is a significant impact on public rights. The 1991 Guidance reads as follows:

> Existing berthing facilities which exceed "reasonable use" guidelines may continue to rely on

> any permit which authorizes specific construction. This remains true unless significantly changed conditions and resulting effects on public rights require permit revision (the Department maintains continuing jurisdiction over such projects) . . . (Exhibit 75)

Further, it was proper that the Department consider the common law reasonable use doctrine, irrespective of the express terms of the 1991 Guidance, in the context of the instant application given the substantial change in use this project represents.

52. In the 1991 Guidance, the Department attempted to provide staff with a threshold numerical standard relating to the reasonable use of riparian frontage. This threshold figure reflects years of experience at the DNR as to existing practices across the State of Wisconsin. (TR, p. 1235) The threshold number is used by DNR staff to provide a tangible starting point for what constitutes a reasonable use of a given riparian tract. (Exhibit 75, p. 2) The threshold number is obtained by use of the following formula by Department field staff:

> REASONABLE USE THRESHOLD
>
> Provided other legal requirements are met [s. 30.13(1) & 30.772, Stats. & NR 326], the "reasonable use" threshold is reached when a property exceeds two berths for the first 50 feet or lesser amount of shoreline and one berth for each additional 50 feet of shoreline in common ownership. We will define a berth as a space at a pier, wharf, boat hoist, boat shelter, or boathouse (wet or dry) for a *single* watercraft appropriate for use at the site and commonly in use at similar sites on the waterway. (As an example, a 100 ft. lot with a dry boathouse which has space to berth a

> single watercraft and a pier which provides space for berthing at either side would provide berths for a total of three watercraft and would not exceed the threshold.) Multiple owner lots such as condominiums, "access lots" or other similar ownership arrangements are not entitled to greater berthing privileges than the shoreline frontage would otherwise provide (2 for the first 50 ft. & 1 for each additional 50 ft.). (Exhibit 75, p. 3)

53. Under a strict application of the reasonable use Guidance, the applicants, owners of approximately 4100 feet of riparian frontage, would be entitled to place no more than 82 or 83 pier slips in public waters at the site. (TR, Nesta, p. 883) Nesta testified that the Department analyzed the instant pier permit application using factors articulated in the Guidance, which itself was an effort to make concrete the evolving concepts of public trust case law. The Guidance recognizes that public marina facilities provide a public benefit, access to public waters for non-riparians, that is not provided by strictly private riparian moorings. (Exhibit 75, p. 4) Under the Guidance and Department policy, to be treated as a "marina or other similar mooring facility" within the meaning of sec. NR 326.04(8)(f), Wis. Admin. Code such facilities must " . . . be open to the general public." Further, "(i)n order to qualify, such facilities must provide all berthing facilities which exceed the 'reasonable use' guidelines to the general public free or for a reasonable fee." (Exhibit 75, p. 4)

54. The record is clear that, prior to conversion to the dockominium form of ownership, the Abbey Marina constituted a "marina" or "other similar mooring facility" within the meaning of sec. NR 326.04(8), Wis Admin. Code. (TR, p. 1328) It is unfortunate that NR 326 does not

define these terms. However, if there were ever an obvious marina or similar mooring facility, it would be the Abbey's massive 407 pier slip configuration that has provided seasonal berthing of boats for many years. Significantly, in applying for the instant permit application, ABKA itself characterized the facility as a "marina." (Exhibit 18, p. 1) The evidence was essentially undisputed that the Abbey charged a "reasonable fee" in light of the high-level of demand for pier slips on Geneva Lake. (See: Findings 75-76).

55. Conversion of all 407 slips to ownership in the form of dockominiums would no longer qualify the Abbey piers for treatment as a "marina" entitled to exceed the reasonable use of its riparian parcel. There was testimony that numerous pier slips, owned by purchasers of dockominiums, were now rented out to the general public. (See: Finding 79) However, this is not the same thing as a facility whose central purpose is the rental of pier slips, as the Abbey Marina was prior to conversion. Instead, these dockominium rentals, which the individual owners may choose to use or rent each year, are much more like an individual pier owner who owns riparian property. He may rent out his pier to others on occasion, nonetheless the pier slip is his and cannot be considered to provide a public benefit. ABKA is the holder of valid permits authorizing 407 pier slips on 4100 feet of riparian frontage. Implicit in the issuance of these permits was the fact that the public benefitted from operation of a marina at the site which provided access to Geneva Lake by virtue of the permit holder renting out pier slips to the public. If the applicants wish to continue to maintain structures with so many pier slips on public waters, they must make a substantial number of slips available to the public for seasonal rental.

56. The plain language of the 1991 Guidance reads as follows: " . . . (S)uch facilities must provide *all berthing facilities which exceed the "reasonable use* guidelines to the general public free or for a reasonable fee." (Exhibit 75, p. 4) Under the 1991 Guidance, 83 slips constituted the threshold for a reasonable use of 4100 feet of riparian frontage, the remaining 314 slips (407 minus 83) must be held open to the public for the Abbey Marina to maintain the current numbers of pier slips. (TR, Johnson, p. 1348) The applicants argue, somewhat disingenuously, that no piers should be "set aside" for public rental, but, if any are required, it should be no more than the 10 to 20 percent identified in an earlier Department guidance. (Exhibit 86, p. 14) However, the testimony of both Johnson and Nesta was that this guidance, dated July 2, 1990, was superseded by the 1991 Guidance. (Exhibit 75, TR, Johnson, p. 1233 and TR, Nesta, p. 967) There is absolutely no basis in the record for applying the July, 1990 Guidance rather than the 1991 Guidance. However, as noted, the Program Guidance is used only for a threshold determination and is not binding on Department staff or the Division of Hearings and Appeals.

57. Conversion of all 407 slips to dockominium status would violate long-held notions of the reasonable use of public trust waters by a riparian. To comport with a reasonable riparian use, a substantial majority of the pier slips must either be eliminated or must continue to be made available to the public for seasonal rental. Conversion of all 407 slips to the dockominium form of ownership would violate the public trust doctrine and the common law notion of "reasonable use" of public waters by a riparian.

58. Nesta testified that the Department's position was that the applicants should require that 200 slips be set aside for public rental. (TR, Nesta, p. 883) Nesta stated that the Department considered several factors in reaching this determination. First, there is a public launch at the marina; second, the piers were pre-existing structures and not proposed for construction; third, a somewhat vague evolution of Department policy led to this determination. (TR, Nesta, pp. 883-888) This latter may well relate to the agreement of ABKA and the DNR, which is specifically by its own terms not binding on the ALJ. (Exhibit 16) Mr. Johnson testified that the Department's initial position was that all but 82 or 83 slips must be set aside for public use, but that, after a meeting between Mr. Earl and Secretary Meyer, the number allowed for private sale jumped from 82 to 207. (TR, Johnson, p. 1530)

59. Taking into account the factors set forth below, and after considering all of the evidence, the ALJ finds that a reasonable use of this riparian frontage would involve the placement of no more than 120 pier slips exclusively held for private riparian usage. Accordingly, the applicants must set aside 287 slips for public rental to maintain an equivalent public benefit as is gained from instant configuration. This number is substantially higher than the reasonable use threshold of 82 to 83 exclusively private riparian slips resulting from a strict application of the 1991 Program Guidance threshold (Exhibit 75) However, the record supports a somewhat higher number because: a) the piers have been in place for an extended period and no new adverse direct environmental consequences would be experienced; b) because the waters in the area of the site are not now regularly used by the Public for any purpose other than the ingress and egress of

boats out of the facility; and c) there is a public boat launch at the site. These factors justify approval of a number approximately 50 percent higher (120 versus 82 or 83) than the threshold that would be considered a reasonable use of the property based upon years of Department experience with similar facilities across the state. (Exhibit 75)

The record does not support authorizing 207 slips for sale. This number apparently was obtained by an effort at a compromise "deal", that was, on its own terms, not binding on the ALJ. Mr. Johnson testified that his own professional judgment at least originally, was that the Program Guidance threshold should be followed and that 324 slips should be set aside for public rental. (TR, Johnson, p. 1507) The record supports a number somewhere between 200 and 324. The applicants are placing a substantial number of piers into public waters. This placement is reasonable only if there is a compensating public benefit of offering 287 slips available for public use. If the applicants no longer wish to operate a marina facility which consistently makes public access to the public waters of Geneva Lake possible by the seasonal rental of pier slips, then the size and scale of massive encroachment on public waters must be reduced to moor no more than 120 boats.

60. The recreational uses of the Harbor will not be changed by the change in the form of ownership and closing of the marina made available to the public. (Nesta testimony) Boating and the mooring of boats will remain the principal use of the marina. However, if all of the pier slips are converted to dockominium status, access to public waters on which the marina is constructed will be denied

to persons who can not afford to purchase a condominium unit.

61. There will be no impacts to wildlife due to the change in the form of ownership and closing of the marina formerly made available to the public through seasonal rentals. (Nesta, Bramer testimony)

62. There will be no change in water quality due to the change in the form of ownership and closing of the marina made available to the public. (Nesta testimony)

63. There is no impact on effective flood flow capacity due to the change in the form of ownership and closing of the marina made available to the public. (Nesta testimony)

64. There will be no change in the size of boats that will be stored at the Marina as a result of the change in the form of ownership and closing of the marina formerly made available to the public through seasonal rentals. (Bramer testimony, Exhibit 18, B)

65. There will be no change in the fishery as a result of the change in the form of ownership and closing of the marina made available to the public. (Nesta testimony)

66. There are no public safety issues created by the change in the form of ownership and closing of the marina made available to the public. (Nesta testimony)

67. There is no impact on natural scenic beauty as a result of the change in the form of ownership and closing of the marina made available to the public. (Nesta testimony)

68. The navigational channels in the Marina comport with standards that are commonly accepted for safe navigation in marinas. (Wentland testimony, Exhibit 51)

69. The Harbor and Marina is a no-wake zone and the no-wake buoys mark the North-South navigational channels in the Harbor. (Whowell testimony)

70. ABKA has not changed the number, size, or configuration of any structure in the Harbor as a result of the change in the form of ownership. The structures in the Harbor and the physical layout remain the same. (Exhibit 18, Nesta testimony)

71. ABKA did not discriminate in regard to which members of the public could become condominium unit owners. Purchase of a Unit was open to anyone who could afford to do so. (Snyder testimony, sec. 703.10(2m), Stats.)

72. Prior to the filing of the Declaration, the Marina operated a licensing program where boat slips were seasonally rented. The seasonal licenses were for seven months, from April 15 until November 1. License renewals were sent on October 1 of each year. (Snyder testimony)

73. Prior to the filing of the Declaration, the people who rented the boat slips on a seasonal basis often rented the slip year after year. It was not uncommon to have people renting the same slip for ten years or more. (Snyder testimony)

74. Prior to 1995, 85% of renters who had license agreements at the Marina rented for more than one year. Further, 42% of renters who had license agreements at the Marina rented for more than ten years and 20% of renters who had license agreements at the Marina rented for more than fifteen years. (Snyder testimony)

75. The license fee at the Marina from 1990 through 1994 ranged from $3,850.00 for the largest slips to $2,743.00 for the smallest. The license fee at the marina in 1995 ranged from $6,000.00 for the largest slips to $4,000.00 for the smallest.

76. There was no increase in rental rates at the Marina from 1990-1994. If the increase in rental rates in 1995 were spread over the period of 1990-1995, it would be an annual 6% increase. (Snyder testimony)

77. The occupancy rate in the Marina prior to 1995 was 94% or above. In 1995, the occupancy rate of boat slips in the Marina was 84% due to the uncertainty created by this proceeding, the delay in instituting the licensing program, and the higher rental rates charged in 1995. (Snyder testimony)

78. During the 1995 boating season, 70 persons decided to rent slips under the licensing program rather than purchase a Unit. (Snyder testimony)

79. Of the 185 Units sold, 69 were rented to members of the public other than the Unit owners in the 1995 boating season. (Snyder testimony)

80. One hundred fifteen (115) of the 185 Units sold have been sold to persons who formerly rented under a seasonal license at the Marina. (Snyder testimony)

81. There are persons who were previously able to afford seasonal rental of a boat slip at the Marina facility, who were unable to afford purchase of a dockominium. (Lavitt, Orsinger) As many as 100 former renters were displaced from Geneva Lake to Lake Michigan, in part because they did not believe purchase of a dockominium was a wise investment or affordable. Other reasons articulated

included concerns about a lack of flexibility in the dockominium scheme in the event of occupying a pier slip next to a person one did not like, or relocation due to a transfer or change in employment. There were no other rental slips available to this large group of boaters which would accommodate their large (30-foot, plus) boats.

82. There would be a net loss of public access to the waters of Geneva Lake as a result of the conversion of all slips to dockominium status. (Nesta, Johnson, Bramer, Orsinger)

83. There is a public boat launch facility in the Marina and the access to that boat launch has not changed as a result of the change in the form of ownership. (Bramer testimony)

84. The Abbey Harbor is located in a deep man-made basin that connects Potawatomi Creek and Geneva Lake. The Creek flows in at the southwest and out into Geneva Lake at the southeast end of the basin. Most if not all of existing navigation is related to the ingress and egress of large boats in the waters of Geneva Lake. (TR, pp. 1164-1165) However, Mr. Sherin testified that the Harbor would be an excellent area to teach the sailing of small boats if the current pier configuration were reduced. (TR. pp. 1137-1145) Because boats must pass under a bridge to gain access to the lake, the site is not suitable for fixed keel sailboats. Ms. Nesta testified that the Department considers any structure that extends beyond a lawfully adopted pierhead ordinance to be an obstruction to navigation unless it is authorized by an appropriate permit. (Nesta Depo., p. 50) ABKA has a permit which authorized four piers to extend beyond the 100 foot pierhead Ordinance in effect at the project site. (Exhibit 20) The marina piers are

an aid to navigation in so much as they facilitate the ingress and egress of boats to the waters of Geneva Lake. In years past, the operation of the marina has been a benefit to public navigation by virtue of providing mooring access to non-riparians. Under the proposed conversion plan, only private riparians (i.e. condominium unit-owners) would benefit from placement of the structures in public navigable waters. The massive encroachment on public waters beyond the 100 foot pierhead line would be a material obstruction to navigation in the absence of the off-setting public benefit of providing regular seasonal boat rentals to` non-riparian members of the public.

The structures will not materially obstruct existing navigation on Geneva Lake and Potawatomi Creek so long as the marina is operated in a manner consistent with the requirements of the permit set forth below. If the marina is operated under the terms and conditions of the permit set forth below, the structures will be an aid to navigation by providing public access to public waters through seasonal boat rentals.

85. The proposed conversion to the dockominium form of ownership will have detrimental cumulative impacts to the administration and maintenance of the public interest in navigable waters. Bruce Haukom, Jefferson County Zoning Administrator testified on behalf of the Wisconsin County Code Administrators. (WCCA) The Executive Committee of the WCCA provided a statement that reflects that the proposed dockominium plan poses issues of statewide concern. WCCA statement concludes as follows:

> . . . We are an association of county employees who work in various departments enforcing a variety of land use, subdivision, and zoning and

sanitation codes. We also serve as agents for the state departments in the enforcement of certain administrative codes. WCCA has recently apprised its membership concerning the proposed dockominium concept of ownership involving the Abbey Resort Marina. WCCA membership was quite alarmed after being advised of the particulars involving this situation. The membership was convinced that this particular matter would have statewide implications. While one can readily see the economic gain from this concept, our perception is that this gain comes at the expense of the resource. The dockominium concept has the potential to negatively impact the water quality, fisheries, and other plant and animal life within this fragile ecosystem. It also is apparent that user conflicts will, in all likelihood, intensify. This will lead to an unhealthy situation for both people and the resource. Some community leaders may see this as a threat to their tax base as there may not be a Need to own high-value land along with the ever-increasing property tax bills if the dockominium type ownership is allowed to begin and then proliferates through Wisconsin's lakes and rivers. Another concern of the WCCA involves the total disregard involving the sensitive relationship between man and nature which we feel is absent in this Abbey development. Just as our counties require an ownership interest in land development plans such as subdivisions, planned unit developments, et cetera, along with developmental standards in real estate lands abutting water bodies must be incorporated into the plan. Tangible riparian ownership of lands abutting water bodies establishes a sound basis for resource protection. Other factors along with standards including frontage, size of parcel, lake

> characteristics, et cetera, must also be incorporated into any development. Cumulatively we believe there are far more negative elements to this concept than positive. Once again, this approach will not be limited to Lake Geneva but may include any of Wisconsin water bodies. (Haukom, TR, pp. 452-453)

Haukom noted that condominium developments in general were not subject to Chapter 236 relating to the platting of land, and that it would be much easier to establish multiple piers under these circumstances.

Ms. Nesta also testified about concerns relating to cumulative detrimental impacts to public waterways. Ms. Nesta summarized her concern in the Water Regulation Investigation Report as follows:

> . . . The current proposal converts the public nature of this facility to 407 private owners with a permanent interest in use of public water. This proposal is also anticipated to have adverse cumulative impacts as it may lead to the conversion of other public facilities to private use, or new proposals, for condo-ownership of pier slips by and what is a reasonable use of shoreline. Approval of boat slip use beyond a reasonable use will also compromise the Department's ability to rescind or revoke such a permit if necessary to protect the public interest in the future. (Exhibit 68)

86. The applicants are financially capable of constructing, maintaining, monitoring or removing the structures if it should be found in the public interest to do so.

87. The structures will not reduce the effective flood flow capacity of Geneva Lake as part of the enlargement of Potawatomi Creek.

88. The structures will not adversely affect water quality nor will they increase water pollution in Geneva Lake. The structures will not cause environmental pollution as defined in sec. 144.01(3), Stats.

89. The complaints filed on or about September 15, 1995, by the Conservancy and WAL under sec. 30.14, Stats. allege that the structures violate Chapter 30, Stats., the public trust doctrine and the Wisconsin Constitution. There is considerable overlap, as the Conservancy acknowledges in its brief, between the issues relating to the instant permit application and the complaints filed under sec. 30.14, Stats. (Conservancy Brief, p. 1) Accordingly, it is appropriate to deal with these issues in summary fashion.

The Department of Natural Resources has made an investigation of its files and concluded as follows:

> "The Department has concluded, based on the history of this project going back to 1962, that the existing slips in the harbor have been authorized by the State of Wisconsin for use as a public marina facility. The Department does not object to the continued maintenance and operation of these slips as a public marina facility. We have concluded, however, that the proposal by the ABKA Limited Partnership to convert these public marina slips to "dockominiums" is a substantial change to the facility requiring review and possible modification of the existing permit."
>
> (Exhibit 15)

The evidence presented at hearing supports both of these conclusions. However, the term "public marina" as used in this context is somewhat misleading. The Abbey has always been held privately. Prior to the dockominium scheme, the Abbey regularly and consistently offered boat slips to the public in the form of seasonal rental. The instant permit application thus involves a substantial change in the implied contract between the public, which has provided ABKA with public waters on which [sic] moor boats, and the private operators of the marina. The existing facility represents a massive private encroachment on public waters; the 407 pier slips consume several acres of public waters. Accordingly, the terms of the previously issued permits must be modified to ensure that the marina continues to provide an offsetting public benefit. The prior permits are accordingly modified to ensure that the project is not detrimental to the public interest in navigable waters.

90. The marina has traditionally maintained a boat launch which it has made available to the public. The applicant did not object to the reasonable permit condition proposed by Mr. Johnson that the public boat launch remain available to the public. (TR, p. 1511)

91. There is no question that the initial marketing of the dockominiums sought to blatantly sell public waters for private benefit. (See: Exhibits 56; 57; 58; 59; 105; 119-121) While the language has been less blatant in recent versions, dockominium purchasers may still believe they are purchasing permanent rights in public waters as a result of the purchase of a condominium unit. Section 7.2 of the Declaration states that each boat slip owner will have "as a limited common element appurtenant exclusively to his unit . . . riparian rights to use of the space

beside the pier or piers corresponding to his unit number." However, it is clear that riparian rights derive not from the purchase of a unit as such, but from the common elements which include riparian lands.

ABKA argues that this conveyance is consistent with the public trust doctrine because there is language in the Declaration which continues to subject dockominium slip holders to state regulation. However, such language could be rendered meaningless once the expectation of a property interest has been established. The record clearly establishes that the Abbey has marketed the dockominium in a manner which would establish such an expectation. Exhibit 105 and 120 contain the following language:

> "individual slips can be owned and transferred by deed", "owning a slip", "ownership of a slip", "slip owners", "price of the slip" and "classes of slips being sold", "high demand for Lake Geneva slips," "limited supply of Lake Geneva slips."

In *Doemel v. Jantz*, 180 Wis. 225, 193 N.W. 393 (1923) the Wisconsin Supreme Court considered the expectations of property owners and how those expectations can take on the force of law which may outweigh judicial considerations of public interest. The court concluded:

> These rights were always considered valuable, and, as a result of such declarations, the doctrines pertaining to riparian rights have become fixed rules of property. Whatever may be our individual inclinations or desires or our views as to propriety or the public welfare, we cannot disturb the interests which have so become vested, at 193 N.W. 393, 398.

Blanket approval of the instant application would likely have the same result. Unit owners would gain vested private rights in public waters which will be largely beyond the control of the DNR or state. Area water management specialist Liesa Nesta testified that the perception of the sale of "permanent" berthing rights was of concern to her as a regulator and would pose a significant burden on the administration of sec. 30.12, Stats., permits. She further testified that although ABKA had made a modification to its original dockominium plan, the current plan is similar in purporting to create permanent rights in an area of public water.

The objectors rely heavily on these concerns with respect to their argument that the dockominium conversion in and of itself violates the public trust doctrine. However, it is not clear that the Division has jurisdiction to order specific limitations on the marketing of "dockominiums." Further, because the permit and Order set forth below will result in the Abbey having to repurchase units previously sold, this issue is not currently necessary for purposes of this decision. All existing unit owners must be made to understand that they have not acquired a permanent interest in public waters, but rather have acquired an ownership interest in lands subject to the Declaration which have certain limited rights as riparians. It is expected at a minimum that all members of the Association, the co-applicant for the instant permit, will be made aware of this decision and any subsequent review decisions bearing on the property rights, perceived and real, of unitholders.

92. At hearing, the ABKA raised the issue of estoppel and argued that ABKA relied upon the February 2, 1995 agreement between the applicant and the Department in

its decision to sell condominium units. (Exhibit 16) However, any reliance was clearly the result of a calculated business gamble, given the plain language of that agreement which contemplated a decision in the instant matter requiring exactly such a buy-back of previously sold slips. " . . . Should the decision of the ALJ require more than 125 slips to be set aside for seasonal leasing or licensing, ABKA will repurchase slips to make up the difference." (Exhibit 16, p. 1) Mr. Antoniou testified that he was familiar with this provision. (TR, p. 134) The record indicated that 185 of the condominium units had been sold as of the date of the hearing. Accordingly, it is expected that ABKA will repurchase 65 units to come into compliance with the terms of the permit set forth below. Any reliance by ABKA was clearly done at its own risk with respect to any claims of reliance or estoppel.

DISCUSSION OF DECISION

This is a matter of first impression under Wisconsin law. The law is silent on the specific issue of whether the dockominium form of ownership is permissible under the public trust doctrine and Chapter 30, Stats. In the absence of a definitive statement from the legislature, it is necessary to consider these complex issues in light of past precedent under the public trust doctrine. After considering the record as a whole, the briefs of the parties and after an exhaustive review of past precedent relating to the interpretation of the public trust doctrine by Wisconsin appellate courts, the ALJ reaches a decision similar to the initial conclusion of the DNR. The only significant difference is that the record supports making a larger number of slips available to the public for seasonal rental. The

decision in this matter relies on two basic principles, which on the surface may appear to be contradictory.

First, that the applicants have not carried their burden of proving that the proposal to convert all of the slips at the marina to "dockominium" status would be "not detrimental to the public interest" in navigable waters within the meaning of sec. 30.12, Stats. Conversion of all slips to dockominium status would be detrimental to the public interest in maintaining public access to the navigable waters of the state, which are held in trust for the public. Further, conversion of all slips to dockominium status would result in significant cumulative detrimental impacts to the maintenance of public access to public waters.

The second fundamental decision in this case is that condominium ownership of the marina does not in itself violate the public trust doctrine. Conversion of all of the pier slips to dockominium status would violate the public trust doctrine and would be detrimental to the public interest in maintaining public access to public waters. However, complete rejection of the proposed dockominium conversion would unfairly discriminate against the condominium form of ownership. Riparian owners in Wisconsin, including riparians who gain such a status by holding land in common through the condominium form of ownership, have the limited right to place a reasonable number of pier slips in public waters to gain access to said waters. The condominium unit-holders in this matter own riparian lands in common with other unit holders including ABKA. (See: Finding 35) Condominium unit-owning riparians are entitled to no more and no less access than other riparians.

The distinction that is central to this case is not the distinction between condominium unit-owners and other riparians. Instead, this case turns on the use to which the riparian owners put the pier slips maintained on public waters. (TR, pp. 1071-72) Prior to the Declaration, ABKA operated a marina that regularly made boat slips available to the public by way of seasonal rental. After the Declaration, and the sale of dockominium units, the pier slips no longer provide the public the benefit of public access to public waters. The Department has consistently allowed larger numbers of pier slips to riparian owners operating marinas, irrespective of the legal form of ownership, because marinas make slips available to the public by seasonal rentals. This practice is appropriate and comports with the central purpose of the public trust doctrine to balance the rights of private riparian users of public waters with the interests of the public as a whole.

Oneida County cites a Suffolk Law Review article that argues as follows:

> Traditional marinas pass the public interest scrutiny by providing access to the waterways for the general public. Typically, marinas offer dockage on a seasonal basis, which is renewable yearly. They often provide launching services to the general boating public, as well as a wide variety of services for both marina slip occupants and transient boaters. A dockominium development, on the other hand, offers a small class of boat owners the exclusive and often permanent right to occupy a portion of the public trust waters. Such long-term, exclusive ownership completely blocks a large portion of the general public, which cannot afford such ownership, from accessing the waterways. . . .

> Those boat owners who can afford dockominiums are among a group of a privileged few who can enjoy exclusive rights to waters which the state holds for the benefit of all people. Extinguishing public rights for the benefit of private parties serves the interest of a few at the expense of many. When marinas convert to dockominiums; an exclusive group enjoys the public trust interests which are "so intrinsically important to every citizen". . . .
>
> Dockominiums provide access to the waterways to a select group of the public. Dockominium proponents contend that those boat owners are also members of the public. Proponents also cite ownership turnover as a means of opening public access. Under any kind of public trust scrutiny, however, dockominium ownership that aids an exclusive class of boat owners does not satisfy the crucial public purpose requirement of the doctrine. *Dockominiums: In Conflict With the Public Trust Doctrine*, 24 Suffolk Univ. Law Review, p. 331, 343-44 (1989)

The record in this matter made this point absolutely clear. Numerous witnesses testified that they had previously gained access to the public waters of Geneva Lake through the Abbey facility, but were subsequently unable to do so because they could not afford to "purchase" a pier slip under the dockominium scheme. Ms. Lillian Lavitt provided compelling testimony that, after fourteen years of renting a pier slip at the Abbey, she and up to 100 of her friends were forced to leave the Abbey because of the high cost ($46,500) of purchasing a pier slip, paying taxes and meeting condominium assessments. (TR, pp. 1079-88) Similar sentiments, along with a deep sense of regret at being forced off Geneva Lake because of the high costs of

purchasing and maintaining a unit, were expressed in the testimony of Ms. Gaillee Orsinger. (TR, pp. 1106-1137) Ms. Lavitt and Ms. Orsinger were both prosperous owners of large boats, but recoiled at the requirement of paying nearly $50,000, plus taxes and condominium assessments, for the right to moor a boat.

The State of Wisconsin has repeatedly expressed its official policy of maintaining public access to public waters. Sec. NR 1.90, Wis. Admin. Code. Ms. Nesta testified that the Department identified two marked differences between a permanent condominium slip and a rental slip. First, the condominium unit would require a greater amount of cash up front to gain access to public waters; second, there was no guarantee there would be sufficient turnover of dockominium units to ensure public access. (TR, pp. 888-89) It is clear from the record in this matter that the State's expressed goal of public access would be jeopardized by the elimination of large private marinas which provide mooring space to the public on a regular basis at a reasonable seasonal rental rate. This would result in detrimental impacts in the public interest in navigable waters. (TR, pp. 1266-69)

ABKA, argues that purchasers of condominium units are members of the public in the same manner as those seeking seasonal rental. They are not. As noted, condominium unit owners are private riparians. The central purpose of the public trust doctrine is to balance the rights of private riparians with the public as a whole. Both Ms. Nesta and Warden Bramer testified that there are three traditional paths of the public to access public waters: a) by owning riparian lands; b) by using public access; c) or by renting a boat slip at a facility that allows non-riparians to do so. The ABKA dockominium plan increases

the number of owners who may share the reasonable use of the riparian parcel at the site. However, as Warden Bramer testified, it reduces the number of slips available to non-riparians for rental by more than half. (TR, pp. 1158-60) The requirement of setting aside a substantial majority of pier slips for rental to non-riparians would remedy concerns about the net loss of public (ie. non-riparian) access. The applicant has not carried its burden of showing that the change in use of the marina reflected in the conversion to condominium status would be "not detrimental to the public interest" within the meaning of sec. 30.12, Stats.

Further, as ABKA concedes in its brief, the DNR must consider reasonably anticipated cumulative detrimental impacts from similar conversions of large private marinas around the state. *Hixon v. PSC*, 32 Wis. 2d 608, 631-32, 146 N.W.2d 577 (1966). The participation of Oneida County, the Wisconsin County Code Administrators, the Wisconsin Association of Lakes and the Wisconsin Realtors Association speaks volumes as to the state-wide interest the instant application has aroused. Further, Ms. Nesta testified of having received contacts from others interested in converting similar docking facilities around the state to so-called dockominium status. (TR, pp. 840-845) There is no question that a massive shift from seasonal rentals to "ownership" of pier slips would exclude large numbers of people from access to public inland lakes after the manner of the Lavitts and Orsingers. This is not conjecture, as the applicant suggests, but a fact demonstrated by a clear preponderance of largely unrebutted evidence.

Wisconsin has a rich history of protecting the public trust in the navigable waters of the state. Wisconsin courts have "jealously guarded the navigable waters of this state

and the rights of the public to use and enjoy them." *Delta Fish and Fur Farms v. Pierce*, 203 Wis. 519, 523 (1931).

It is well established that riparian rights are qualified, subordinate and subject to the paramount interest of the state and the paramount rights of the public in navigable waters. *State v. Bleck*, 114 Wis. 2d at 467; *Mayer v. Grueber*, 29 Wis. 2d 168, 173-74 (1965); *Ashwaubenon v. Public Service Comm.*, 22 Wis. 2d 38, 49, 647 (1963); *Att'y Gen. ex rel. Becker v. Bay Boom W.R. & F. Co.*, 172 Wis. 363, 375 (1920); *State ex rel. Thomas Furnace Co. v. Milwaukee*, 156 Wis. 549, 553-54 (1914).

The general proposition pertaining to the hierarchical relationship between riparian and public rights specifically applies to the construction of a pier or similar structure in aid of a riparian's navigation. Wisconsin courts have consistently held that a riparian owner's right of access to and from the water and right to build a pier to effectuate such access are limited and subordinate to public rights. *Delaphaine v. C. & N.W. R'y. Co.*, 42 Wis. 214, 226 (1877) (riparian owner has right to build piers to navigable waters not interfering with the public use). In *Cohn v. Wausau Boom Co.*, 47 Wis. 2d 314, 322 (1879) the Wisconsin Supreme Court held:

> "It is settled in the state that a riparian owner on navigable water may construct a front of his land, in shoal water, proper wharves, piers and booms, in aid of navigation, at his peril of obstructing it, *far enough to reach actually navigable waters*." (emphasis added)

In *Bond v. Wojahn*, 269 Wis. 235, 239 (1954) the Wisconsin Supreme Court held:

> "In some respects, the rights of riparian owners on navigable streams and navigable or meandered lakes differ, but one of the common rights is the right to build a pier in front of his land *a sufficient distance to reach actually navigable water*." (emphasis added)

Similarly, "Exclusive use of the apportioned riparian tract only extends so far as to reach the line of navigability." *Nosek v. Stryker*, 103 Wis. 2d 633, 640 (1981)

Selvin, *The Public Trust Doctrine in American Law and Economic Policy, 1789-1920*, 6 Wis. Law Rev. 1403 (1980) comments as follows:

> The public trust doctrine states that the tidelands and certain other lands and waters are held in a trust by the citizens of the various sovereign states and municipalities to be used only for the benefit of the general public. The doctrine, in its most abstract sense, prohibits the sale or disposition of these resources for exclusively private benefit and dictates that the state or municipality retains the inalienable power to regulate the use of this property even if it is granted into private ownership. (Footnote 4 at p. 1403.)

The public trust doctrine reflects an effort by the law to balance the rights of riparians with rights of the public in waters held in public trust. The right of reasonable use of water was one of the rights assured owners adjacent to lakes and streams, others including the right to accretions, relictions, pierages and wharfages. What constitutes a reasonable use, under the common-law test, is a factual determination, varying from case to case and subject to a trust doctrine concept that sees all natural resources in this state as impressed with a trust for usage and conservation

as a state resource. *State ex. rel. Chain O'Lakes Assoc. v. Moses*, 53 Wis. 2d 579, 582, 193 N.W.2d 708 (1972). Factors to be taken into account include: " . . . . the subject matter of the use, the occasion and manner of its application, its object, extent and the necessity for it, to the previous usage, and to the nature and condition of the improvements upon the stream; and also the size of the stream, the fall of water, its volume, velocity and prospective rise and fall. . . . " *Timm v. Bear*, 29 Wis. 254, 265 (1871). Both "the subject matter of the use" and "the occasion and manner of its application" at the marina would be changed fundamentally if the entire marina was converted to dockominium status and the boat slips were no longer regularly and consistently made available to the public by way of seasonal rental.

The Department of Natural Resources is charged by the legislature with the protection, maintenance and management of the public waters of this state. Sec. 144.025(1), Stats. The Department has drafted a nonbinding Guidance Document which attempts to incorporate case law and provide a threshold for field staff making "reasonable use" determinations. (Exhibit 75) This 1991 Program Guidance represented an attempt by the Department to incorporate its experience, technical competence and specialized knowledge relating to balancing of private riparian rights and the public interest in navigable waters. The issue of the reasonable use of public waters by riparians attempting to gain access to said waters is an issue which has repeatedly presented itself to the Department. The Program Guidance of 1991 is therefore entitled to "great weight" to the extent that it reflects the Department's statutory interpretation of sec. 30.12,

Stats. and public trust law. *Kelley Co., Inc. v. Marquardt*, 172 Wis. 2d 234, 244, 493 N.W.2d 68 (1992).

The Guidance Document has not been used as a defacto rule as the Wisconsin Realtors Association, (WRA) argues. The elements of a rule are:

(1) a regulation, standard, statement of policy or general order,

(2) of general application,

(3) having the effect of law

(4) issued by an agency

(5) to implement, interpret or make specific legislation enforced or administered by an agency.

Plumbing Apprenticeship Committee v. DILHR, 172 Wis. 2d 299, 321, 493 N.W.2d 744 (Wis. Ct. App. 1992).

The Department's program guidances clearly do not meet those described elements. In particular, the 1991 Program guidance does not purport to be, and is not, a "regulation, standard, statement of policy or general order". The guidance explicitly states that is not intended to be such a standard. The Guidance was "issued by the agency", specifically as an insertion into the Water Regulation Handbook and Law Enforcement Handbook. However, staff were advised not to use the Guidance as a rule "of general application" . . . "having the effect of law". Mr. George E. Meyer, then Administrator of the Division of Enforcement, in signing off on the Guidance, explicitly advised staff that it was not a rule having the effect of law and could not be used or applied as such.

" . . . 3) We cannot simply cite the guidelines described below ("reasonable use" threshold, pier

> width, etc) in denying permit applications. They are not rule or statutory standards. Any objection cr permit denial must state how the proposal which exceeds the threshold or guidelines in combination with similar future projects would not comply with statutory requirements by adversely affecting particular public rights and interests in a particular water." (Exhibit 75, p. 3)

As noted, Wisconsin appellate courts have consistently held that balancing of public and private rights is to be done on a case by case basis. *State ex. rel. Chain O'Lakes Assoc.* op. cit. at p. 582 Accordingly, in the 1991 Guidance, the Department has sought to give its staff an understanding of the common law in this area to provide the necessary analytical tools for field staff to exercise their discretion in their area of expertise. Mr. Johnson, one of the principal drafters of the 1991 Guidance, testified that the Guidance was "background knowledge" and an "analytical tool" for field staff attempting to make complex judgments regarding the balancing of public and private rights. In its brief, the WRA argues that " . . . the Department should be reprimanded and condemned for its improper actions in promulgating and using the Guidances as it has." (WRA Brief, p. 57) This argument misses the practical point that there are water management specialists across the state who must process Chapter 30 applications, relying on complex common law principles and individual, case-by-case, site criteria. On the whole, the authors of the Guidance should be praised for getting a coherent body of knowledge into the hands of such staff in the hope that they will utilize a consistent reasoning process in processing such applications. The 1991 Guidance does not purport to "implement, interpret or make specific legislation . . . administered by the agency".

Rather, it advised staff of the common law background of the general public interest standards and admonishes them to consider those factors recognized in the common law before making a permit decision.

The only aspect of the 1991 Guidance that comes close to constituting an improper rulemaking are the numerical standards which attempt to quantify the common law principle that mooring privileges generally accrue in proportion to the amount of riparian frontage owned. However, the testimony of Mr. Johnson was that the numerical standards were "threshold figures" based upon the expertise of Department water management coordindators [sic] as to the existing practice throughout the state of Wisconsin. (TR, p. 1235) The threshold numbers assist staff in determining if a permit is necessary in the first instance, and provide a starting point for a discussion of what constitutes a reasonable use of a given riparian tract. These numbers are not absolutely applied as a rule, but rather " . . . identify the threshold beyond which there should be a more rigorous evaluation to determine whether a riparian owner may have exceeded reasonable berthing and mooring privileges and whether adverse effects on public rights and interests in navigable waters are significant." (Exhibit 75, p. 2) Under these applications, the numerical standards have not been applied as an illegal rule-making. The applicant, riparian owner of 4100 feet frontage, would be entitled to 82-83 slips under a strict application of the non-binding reasonable use guidance. (TR, p. 883) This number represents a starting place, based upon years of experience and expertise at the Department, as to what would constitute a reasonable use of this riparian parcel. Based upon the record as a whole, a

somewhat higher number is appropriate as set forth above. (Finding 59)

To some degree the dockominium concept involves a legal fiction: that ABKA is selling the lock-box condominium units, rather than the pier slips, for nearly $50,000. However, the ALJ is bound to apply the law as he finds it. This decision attempts to balance the rights of the private riparians and members of the public as a whole. To a much lesser degree, the distinction between "members of the public" and "private riparians", is also a somewhat legalistic concept. The record was clear that some long-time renters have bought condominium units, and thus, rights to a slip. However, it would clearly be unfair to let the unit-owners have it both ways: to be a "private riparian" when it suits them, to gain riparian rights, but to treat them as "members of the public" with respect to concerns about public access to public waters. The Department's reasoning process in this difficult matter was sound, and was in accordance with longstanding DNR practice. Considering the record as a whole, the balancing reflected in this decision shifts slightly toward public rights in the requirement to make a larger number of slips available to the public for seasonal rental. It should be noted that this decision is similar to the position initially articulated by the DNR Water Regulation and Zoning staff prior to the non-binding February 2, 1995 agreement between ABKA and the DNR.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority pursuant to secs. 227.43(1)(b), sec. 30.07(2) and sec. 30.12, Stats., to hear contested cases and issue necessary

Orders relating to the issuance, modification or rescission of permits to place structures on the beds of navigable waters of the State of Wisconsin.

2. Riparian owners are those who have title to the ownership of land on the bank of a body of water. *Stoesser v. Shore Drive Partnership*, 172 Wis. 2d 660, 665, 494 N.W.2d 204, 207 (1993).

3. ABKA owns land on the bank of navigable waters of the state and is, accordingly, a riparian within the meaning of sec. 30.12, Stats.

4. The marina pier facilities described in the Findings of Fact constitute structures within the meaning of sec. 30.12, Stats.

5. The State of Wisconsin has jurisdiction over all waters within its borders. Under Wis. Const. Art IX § 1, from which the Public Trust Doctrine has evolved, the state also has the responsibility of keeping those waters accessible to the residents of the state:

> The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.

6. The state has maintained its pre-eminence in the control of its navigable waters. *DNR v. Clintonville*, 53 Wis. 2d 1 (1971).

7. The state of Wisconsin has delegated its trusteeship of the waters of the state to the Department of Natural Resources. Section 144.025, Stats., provides:

> (1) **Statement of policy and purpose.** The department of natural resources shall serve as the central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, pubic and private.
>
> (2) **Powers and duties.** (a) The department shall have general supervision and control over the waters of the state.

8. This delegation is to be interpreted broadly, and the Department's ability to regulate activity consistent with the public trust is comprehensive.

> Title to the navigable waters of the state and to the beds of navigable waters is "vested and continues in the state of Wisconsin in trust for the use of the public." This "public trust" duty requires the state not only to promote navigation but also to protect and preserve its waters for fishing, hunting, recreation, and scenic beauty. The state's responsibility in the area has long been acknowledged. However, increased leisure time, improved transportation facilities, the consequent growth of Wisconsin's water-centered recreation industry, and the continued deterioration of the quality of the waters of the state have awakened widespread interest in all Wisconsin's waters and have served to underscore the fact that maintaining pure and attractive rivers,

> lakes and streams is a matter of statewide concern.
>
> In furtherance of the state's affirmative obligations as trustee of navigable waters, the legislature has delegated substantial authority over water management matters to the DNR. The duties of the DNR are comprehensive, and its role in protecting state waters is clearly dominant.

Wisconsin Environmental, Decade, Inc. v. DNR, 85 Wis. 2d 518, 526 (1978) (citations omitted). "The DNR, in carrying out its duties, is dominant in its role in protecting state waters." *Public Intervenor v. DNR*, 115 Wis. 2d 28, 39 (1983).

> The state has the power, as a trustee for the public to regulate public uses of navigable waters to best accomplish and promote the public interest. The unavoidable conclusion that the waters are subject to DNR jurisdiction is necessary to assure the realization of the purposes of the public trust doctrine: to promote navigation and to protect and preserve those waters for fishing, recreation and scenic beauty. *Klingeisen v. DNR*, 163 Wis. 2d 921, 929 (Wis. Ct. App. 1991).

9. Riparian owners do not have absolute rights to place structures in the waters, or use them in whatever form, especially if those structures interfere with public rights and interests. *State v. Bleck*, 114 Wis. 2d 454, 467 (1983); *Mayer v. Grueber*, 29 Wis. 2d 168, 173-74 (1965); *Town of Ashwaubenon v. Public Service Commission*, 22 Wis. 2d 38, 49 (1963); *Attorney General ex rel. Becker v. Bay Boom Wild Rice & Fur Co.*, 172 Wis. 363, 375; *State ex rel. Thomas Furnace Co. v. Milwaukee*, 156 Wis. 549, 553-54 (1914). The terms "public rights" and "public interest" include a broad range of considerations, including navigation

and all its incidents, which include fishing, boating, swimming, hunting and enjoyment of scenic beauty. As clearly and repeatedly as the courts have asserted the conditional nature of riparian rights, so too have the courts "jealously guarded the navigable waters of this state and the rights of the public to use and enjoy them," *Delta Fish and Fur Farms, Inc. v. Pierce*, 203 Wis. 519, 523 (1931).

10. The public trust doctrine reflects an effort by the law to balance the rights of riparians with rights of the public in waters held in public trust. The right of reasonable use of water was one of the rights assured owners adjacent to lakes and streams, others including the right to accretions, relictions, pierages and wharfages. What constitutes a reasonable use, under the common-law test, is a factual determination, varying from case to case, and subject to a trust doctrine concept that sees all natural resources in this state as impressed with a trust for usage and conservation as a state resource. *State ex. rel. Chain O'Lakes Assoc. v. Moses*, 53 Wis. 2d 579, 582, 193 N.W.2d. 708 (1972). Factors to be taken into account include: " . . . the subject matter of the use, the occasion and manner of its application, its object, extent and the necessity for it, to the previous usage, and to the nature and condition of the improvements upon the stream; and also the size of the stream, the fall of water, its volume, velocity and prospective rise and fall . . . " *Timm v. Bear*, 29 Wis. 254, 265 (1871).

Balancing the rights of ABKA and the Condominium Association members, with the rights of the public to "use and enjoy" public waters it is clear that prior to the dockominium scheme, the public previously derived the benefit of the availability of seasonal rental of mooring

slips on Geneva Lake. This public benefit offset the clearly excessive placement of 407 pier slips on public waters. If all of the pier slips were converted to private dockominiums, which may or may not be offered to the public for seasonal rental, the new use of public waters would clearly be unreasonable. A "reasonable use" of the riparian frontage would involve the placement of no more than 120 pier slips.

11. The DNR must consider the "cumulative effects" on public rights when considering an application for a Chapter 30, Stats., permit. *Hixon v. PSC*, 32 Wis. 2d 608, 631-32, 146 N.W.2d 577 (1966). There would be substantial detrimental "cumulative effects" reasonably anticipated from approval of conversion of all existing structures to "dockominium" status.

The blanket approval of such a conversion would detrimentally impact public access to public waters if large marinas which previously offered seasonal rentals to the public instead effectively sold such slips to private parties which may or may not re-rent them. Public access to public waters would also be detrimentally impacted because many individuals could not afford to "buy" a pier slip.

Both of these concerns can be remedied by a permit condition requiring that 287 slips be made available to the public for seasonal rental.

12. The Department, upon application and after proceeding in accordance with sec. 30.02(3) and (4), may grant to any riparian owner a permit to build or maintain for the owner's use a structure otherwise prohibited under sub. (1), if the structure does not materially obstruct navigation or reduce the effective flood flow capacity of a

stream and is not detrimental to the public interest. Section 30.12(2), Stats.

13. The proposed conversion of all existing pier slips would be detrimental to the public interest in navigable waters.

14. The project as modified by the permit conditions would not be "detrimental to the public interest" within the meaning of sec. 30.12, Stats., so long as it is maintained in a manner consistent with the permit conditions set forth below.

15. There is no express or implied "discrimination" against the condominium form of ownership in requiring that 287 pier slips be made available to the public for seasonal rental. The Department has consistently applied the "reasonable use" concept of the public trust doctrine to all forms of ownership. A marina that no longer regularly offers boat slips available for seasonal rental, regardless of the form of ownership, has undergone a substantial change in use that warrants reexamination of permit terms and conditions.

16. There is no violation of sec. 703.27, Stats., relating to zoning and building regulations. No "zoning or building regulations" are implicated in the instant sec. 30.12, Stats., permit proceeding. The instant permit as set forth below imposes no burden or restriction, of any kind, on the permit-holder which would not be applied to a similarly situated marina seeking to end regular seasonal rentals to the public.

17. On its face, sec. 703.27, Stats., does not apply to the State. *State ex rel. Martin v. Reis*, 230 Wis. 683, 689 (1939). The Attorney General has opined that statutes of

general application do not apply to the state unless the state is explicitly included by appropriate language. (69 O.A.G. 103, 1980)

18. An individual condominium unit owner owns the lock-box unit located in the Harbor House. A condominium unit, together with its undivided interest in the common elements, constitutes real property for "all purposes." Sec. 703.04, Stats.

19. Because the unit owners hold the riparian property adjacent to the pier as a common element, they have riparian status within the meaning of sec. 30.12, Stats. *Stoesser*, op. cit.

20. The provisions of sec. NR 326, Wis. Admin. Code are binding upon the Division for purposes of reaching a decision in this contested case proceeding. Sec. 227.45(4), Stats. The ALJ lacks authority to rule on whether the Department exceeded its lawful authority in promulgating NR 326.

21. The provisions of NR 326 apply to the instant permit application. NR 326.02(1) and (2)(a), Wis. Admin Code.

22. Under NR 326, piers associated with marinas and other similar mooring facilities shall not extend into the waters from the shoreline beyond the line of navigation unless a permit is attained under sec. 30.12(2), Stats. Such marinas shall be open to the public. Use of the facility by the public may be conditioned only on the payment of a reasonable mooring or anchoring fee. NR 326.04(8), Wis. Admin. Code.

23. Sec. 30.14(2), Stats. provides as follows:

> (2) HEARINGS BY DEPARTMENT. Upon complaint by any person to the department that any wharf, pier or other structure exists in navigable water in violation of s. 30.12 or 30.13 or that any wharf, pier or other structure proposed to be built in navigable water will violate s. 30.12 or 30.13, the department shall investigate and may hold a hearing to determine whether the wharf, pier, or other structure is or would be in violation of those sections.

24. The structures as described above will not "violate" sec. 30.12, stats. so long as the facility is operated in accordance with the permit conditions set forth below. The permit conditions set forth below are necessary to preserve and protect the navigable waters held in trust for the public.

> 25. **NR 1.90 Public access policy for waterways.** (1) It is the goal of the State of Wisconsin to provide, maintain and improve access to the State's navigable lakes, rivers and streams for the public. Public access facilities shall allow for public rights of navigation, related incidental uses and other uses which are appropriate for the waterway. Waterway uses shall be equally available to all waterway users and include enjoyment of natural scenic beauty and serenity. These public rights and uses may be provided by any combination of publicly and privately owned access facilities which are available to the general public free or for a reasonable fee. The department, alone or in cooperation with local government, shall exercise its management and regulatory responsibilities to achieve this goal and to assure that levels and types of use of

navigable waters are consistent with protection of public health, safety and welfare, including protection of natural resources. Wis. Admin. Code.

26. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Admin. Code. Type III actions do not require the preparation of a formal environmental impact assessment.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the co-applicants, ABKA, and the Abbey Harbor Condominium Association, Ltd., a permit under sec. 30.12, Stats., for the maintenance of a structure as described in the foregoing Findings of Fact, subject, however, to the conditions that:

1. The authority herein granted can be amended or rescinded if the structures become a material obstruction to navigation or become detrimental to the public interest.

2. The permittee shall waive any objection to the free and unlimited inspection of the premises, site or facility at any time by any employe of the Department of Natural Resources for the purpose of investigating the construction, operation and maintenance of the project.

3. A copy of this permit shall be kept at the site at all times and shall be made available to condominium unit-owners upon request.

4. The permittee shall obtain any necessary authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.

5. The boat launch on the premises shall be regularly made available to the public for the launching of boats.

6. If the applicants choose not to regularly offer boat slips for seasonal rental, the total number of boats permanently moored in the marina shall not exceed 120. The applicant shall not allow more than one boat to occupy any slip other than on a temporary basis.

7. If the applicants chose to continue operation of a private marina regularly making boat slips available to the public by offering seasonal rentals, the total number of boats moored shall not exceed 407.

8. A total of 287 slips shall be rented or leased for a term not to exceed five years per rental or lease period. At the expiration of the five year lease or rental period, the rental agreement or lease may be renewed.

9. Availability of slips shall be advertised in the local newspaper of greatest general circulation at least twice each spring.

10. A waiting list of persons interested in renting or leasing a slip shall be maintained by the applicant with the waiting list kept current and updated at least once every two years.

11. The waiting list shall be made available to the Department upon reasonable request during normal business hours and at the normal office location.

12. Fees for slip rental or lease shall be reasonable. "Reasonable fees" means fees which are consistent with fees charged at similar facilities

in the area which are available to the general public.

ORDER

IT IS HEREBY ORDERED, that a permit be granted under the specific terms and conditions described above;

IT IS FURTHER ORDERED, that the Motion for Reconsideration of ABKA, relating to the admission of Exhibits 116 and 117 is DENIED, for the reasons stated at hearing;

IT IS FURTHER ORDERED, that the above-captioned actions be DISMISSED.

Dated at Madison, Wisconsin on July 29, 1996.

STATE OF WISCONSIN
DIVISION OF HEARINGS
AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 267-2744

By /s/ Jeffrey D. Boldt
JEFFREY D. BOLDT
ADMINISTRATIVE LAW
JUDGE

[SEAL]

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110 EAST MAIN STREET, SUITE 215
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FACSIMILE (608) 267-0640
Web Site: www.courts.state.wi.us

October 23, 2002

To:

Waltraud A. Arts
Quarles & Brady, LLP
P.O. Box 2113
Madison, WI 53701-2113

Debra P. Conrad
4801 Forrest Run Rd., #201
Madison, WI 53704-7337

Anthony S. Earl
Quarles & Brady
PO Box 2113
Madison, WI 53701-2113

John S. Greene
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Lawrence R. Heath
Corporation Counsel
P.O. Box 400
Rhinelander, WI 54501

William P. O'Connor
Wheeler, Van Sickle & Anderson, S.C.
25 West Main Street, Suite 801
Madison, WI 53703-3398

Winston A. Ostrow
Godfrey & Kahn S.C.
P.O. Box 13067
Green Bay, WI 54307-3067

Thomas L. Shriner Jr.
Foley & Lardner
777 E. Wisconsin Avenue
Milwaukee, WI 53202-5367

Donald L. Romundson
LaFollette Godfrey & Kahn
1 E. Main St. #500,
P.O. Box 2719
Madison, WI 53701-2719

Michael S. Heffernan
Foley & Lardner
P.O. Box 1497
Madison, WI 53701-1497

Peter B. King
P.O. Box 374
Fontana, WI 53125

John A. Kassner III
Brennan, Steil, Basting & MacDougall, S.C.
P.O. Box 990
Madison, WI 53701-0990

John B. Nielsen
Reinhart Boerner Van Deuren S.C.
P.O. Box 2965
Milwaukee, WI 53201-2965

Robert W. Larsen #2
5205 Tonyawatha Trail
Monona, WI 53716

G. Michael Halfenger
Foley & Lardner
777 East Wisconsin Ave., Ste. 3600
Milwaukee, WI 53202-5367

Mary Beth Peranteau
Wheeler, Van Sickle & Anderson, S.C.
25 W. Main St., Suite 801
Madison, WI 53703-3398

Thomas D. Larson
Wisconsin Realtors Association
4801 Forest Run Road
Madison, WI 53704-7337

Beth E. Hanan
Reinhart, Boerner, Van Dueren, S.C.
P.O. Box 2965
Milwaukee, WI 53201-2965

You are hereby notified that the Court has entered the following order:

99-2306 ABKA Limited v. DNR

Circuit Court case Nos. 96CV436, 96CV438, 96CV602, 96CV605, 96CV607

The court has considered the Motion for Reconsideration filed by ABKA Limited Partnership and The Abbey Harbor Condominium Association, responses by Wisconsin Dept. of Natural Resources, Wisconsin Association of Lakes, Wisconsin Realtors Association, and Wisconsin Builders

Association, and reply filed by ABKA Limited Partnership and The Abbey Harbor Condominium Association.

IT IS ORDERED that the Motion for Reconsideration is denied, with $50.00 costs assessed against petitioners ABKA Limited Partnership and The Abbey Harbor Condominium Association.

Cornelia G. Clark
Clerk of Supreme Court